

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7466

Investigation into Petition Filed by Vermont Department)
of Public Service Re: Energy Efficiency Utility Structure)

Hearings at
Montpelier, Vermont
September 15-16, 2009

Order entered: 11/24/2009

ORDER APPROVING CHANGE IN EEU STRUCTURE
AND SCHEDULING STATUS CONFERENCE

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I. INTRODUCTION

In this Order the Public Service Board ("Board") alters the structural model of the Energy Efficiency Utility ("EEU") from a contract-based model to an Order of Appointment model as authorized by 30 V.S.A. § 209(d)(5). The EEU in its present form has served ratepayers admirably since its creation in 2000; however, the increased responsibilities that have been assigned to the EEU since that time, along with the experience gained as the Board and other parties have implemented the EEU, lead us to conclude that moving to a new model will provide additional benefit to Vermont ratepayers.

This new structure retains the essential functions of the existing EEU but changes the relationship of the EEU with the Board and other entities. In particular, rather than being under a three-year contract with the Board, the EEU will move to a twelve-year² rolling Order of Appointment model that will provide additional program stability and better serve ratepayers. Under this new model, the Board will no longer have a contractual relationship with the EEU, and the EEU will have increased responsibilities as well as increased oversight that is accomplished through more transparent proceedings and additional periodic, public reviews. To ensure continued superior performance from the EEU, the Order of Appointment Model will include the existing evaluation and review processes, as well as periodic benchmarking reviews and Overall Performance Assessments that will be conducted in proceedings open to the public.

Given the longer term under which the EEU will operate, we are requiring that the two current energy efficiency providers, Vermont Energy Investment Corporation ("VEIC")³ and the City of Burlington Electric Department ("BED") be subject to Initial Overall Performance Assessments ("Initial OPAs"). The Initial OPA, as well as the periodic reviews, will be conducted through an open and public process. The Initial OPAs will review the current providers' effectiveness and determine whether, in the case of VEIC, a competitive solicitation is warranted and, in the case of BED, whether the statewide provider should deliver all EEU services in BED's service territory. The goal of both Initial OPAs will be to ensure that

2. As discussed below, in Section VB, after the initial 12-year appointment, subsequent appointments would be for approximately 11 years.

3. As explained further, below, VEIC is the entity that currently operates under contract to the Board to serve as Efficiency Vermont.

Vermonters receive the maximum value possible from this ratepayer-funded program. Additionally, Section 209(d)(5) expressly allows the appointment of multiple EEU's. Accordingly, the Initial OPAs may identify specific programmatic areas which could be better served by providers other than VEIC and BED, in which case the Board may choose to appoint an additional EEU.

The move toward the appointment model will take time; given the complexities of the task, the Board is appointing a Hearing Officer to conduct additional proceedings to address the transition to this new structure, including the development of a proposed Order of Appointment and a determination of the roles of certain entities currently involved in the EEU.

II. BACKGROUND

On September 30, 1999, the Board issued an Order in Docket 5980, the Board's investigation into the establishment of a statewide energy efficiency utility, that approved a comprehensive settlement among parties and created Vermont's EEU. Initially, the EEU was responsible for providing electric efficiency strategies and measures to the state's electric ratepayers. Currently, the Board conducts a competitive solicitation process and issues a performance-based three-year contract, with a three-year renewal option, to an entity to administer efficiency services under the trade name "Efficiency Vermont." As part of the settlement agreement in Docket 5980, BED has continued to provide EEU services in its own service territory.

In 1999, the Legislature added 30 V.S.A. § 209(d)(2) to clarify the Board's authority to appoint an entity to deliver energy efficiency programs in multiple service territories.⁴ As modified in 2008, Section 209(d)(2) now provides that "the Board shall,⁵ after notice and opportunity for hearing, provide for the development, implementation, and monitoring of gas⁶

4. Public Act 60, § 1 (1999 Vt., Bien. Sess.).

5. In 2008, the Legislature substituted "shall" for "may" in this sentence. Public Act 92, § 12 (2008 Vt., Adj. Sess.).

6. Vermont Gas Systems, Inc. ("VGS") offers demand-side management programs and energy efficiency services to its customers. These services are separately provided from the EEU's programs. However, VGS does coordinate with the EEU to ensure effective program administration and to combine efforts when appropriate. See Section

(continued...)

and electric energy efficiency and conservation programs and measures including programs and measures delivered in multiple service territories, by one or more entities appointed by the Board for these purposes." On October 29, 1999, the Board issued a Request for Proposals to solicit responses from entities interested in providing the energy efficiency services in Vermont.⁷ The initial contract was awarded to VEIC and the EEU began operation in March of 2000. VEIC's contract was renewed in 2003. On April 27, 2005, the Board issued a second Request for Proposals for the EEU services to begin in 2006. VEIC was again awarded the contract; it was renewed for an additional three years in 2009.

The EEU's performance is measured by standards called "performance indicators" which are negotiated by the Board and the EEU as part of the contract negotiation process. The Vermont Department of Public Service ("DPS" or "Department") provides significant input on these goals. The negotiation of the performance indicators, as well as the negotiation of other terms and conditions of the contract, are currently conducted in private sessions.

The EEU's electric efficiency services are funded through a separately stated Energy Efficiency Charge ("EEC") on electric ratepayers' bills. Recently, the Legislature added the provision of energy efficiency services for heating and process-fuel customers to the responsibilities of the EEU, funded by mechanisms other than the EEC. The EEU's heating and process-fuel efficiency programs are funded through the proceeds from Vermont's participation in the ISO-New England, Inc. ("ISO-NE") Forward Capacity Market⁸ and in the Regional

6. (...continued)
VIII A2 for further discussion of VGS's role.

7. Although the Request for Proposals was designed to solicit a single entity to provide all EEU services throughout the State, other than in BED's service territory, the Board has the discretion to choose multiple service providers according to demonstrated expertise, by geographic area, or on any other appropriate basis. See Section VIII A3 for more information.

8. ISO-NE is the regional transmission organization for the New England region. It is responsible for operating the bulk electric power system, administering New England's competitive wholesale power markets, and managing planning processes for the bulk electric power system and wholesale power markets.

The Forward Capacity Market is a market-based structure designed to ensure that there are sufficient resources to serve New England's peak load. The Forward Capacity Market utilizes an auction structure through which capacity resources compete to obtain a market-priced capacity payment, in exchange for a commitment to be available in future years to meet the region's electricity needs. Energy efficiency is eligible to bid into the Forward Capacity Market. Bids are made three years before the beginning of the commitment period (when the resource must be available).

Greenhouse Gas Initiative. The combined revenues from each of these sources comprise the EEU Fund.

The Board sets EEU budgets for electric efficiency services on a three-year cycle. The DPS and other interested parties are involved in the budget-setting process and have opportunities to provide comments. The budgets for the EEU's heating and process-fuel efficiency programs are estimated based on the expected results of Vermont's participation in the ISO-NE Forward Capacity Market and in the Regional Greenhouse Gas Initiative.

The EEU provides efficiency services in a variety of ways to meet the goals of the State as set forth by statute and in the contract, including but not limited to the provision of incentives for efficient technologies, technical assistance, and training and education. The EEU is also required to identify new strategies to acquire all reasonably achievable cost-effective measures.

On July 13, 2007, the Board issued a memorandum⁹ opening a workshop process to consider changes to the overall EEU program structure given the lessons learned after more than seven years in operation. The memorandum included a document titled "Task Statement for Discussion of EEU Structure" that outlined the reasons for considering a new structure, and provided goals for the EEU Structure Working Group. The memorandum also included a document titled "Descriptions of Some Structural Models" that described some other structural models for the EEU Structure Working Group to consider. The Board noted that the current three-year contract cycle is problematic for long-term planning efforts. The Board also recognized that overseeing the EEU services through a contract, regardless of the length of the contract, creates challenges related to the Board's quasi-judicial role.

On August 9, 2007, Board staff held the first meeting of the EEU Structure Working Group. On August 15, 2007, a "next steps" memorandum was issued outlining the steps that

8. (...continued)

Vermont law requires the Board and the DPS to advocate in regional and federal venues for comparable treatment of all resources, including energy efficiency, generation transmission and demand response resources. Public Act No. 61, § 8 (2005 Vt., Bien. Sess.). In addition, 30 V.S.A. § 209(d)(7) provides that the net revenues above costs associated with payments from ISO-NE for capacity savings resulting from the activities of the EEU shall be used by the EEU to deliver energy efficiency services to heating and process-fuel customers.

9. Exh. Board-1.

would allow workshop participants to explore potential changes to the EEU structure.¹⁰

Recommendations were requested from workshop participants on the appropriate structure that would best address the challenges identified regarding the existing EEU structure.

A series of 18 workshops was held by Board members and staff. Among the possible models examined by the EEU Structure Working Group was an Order of Appointment for a term of 12 years.

In 2008, the Legislature amended 30 V.S.A. § 209(d) to add (d)(5) to authorize the Board to appoint an entity to serve as an EEU either through a contract or by an Order of Appointment.¹¹ The statute limits the duration of an Order of Appointment to a period not to exceed 12 years, although an entity may be reappointed by order or contract. The Board is authorized by the statute to include any conditions and requirements in the Order of Appointment that will promote the public good.

The final workshop of the EEU Structure Working Group was held on June 3, 2008. The result of the EEU Structure Working Group was a comprehensive document that set forth a proposal to change the EEU structure from a contract model to an Order of Appointment. The 2008 Draft Recommendation¹² was the product of extensive discussion, and there was broad support for many elements therein from many parties, but it was not a consensus recommendation. Not all parties agreed on each provision of the 2008 Draft Recommendation, and some parties fundamentally did not agree with moving to a new structure.¹³

III. PROCEDURAL HISTORY

On August 28, 2008, the Department filed a petition requesting that the Board open an investigation, pursuant to 30 V.S.A. §§ 2(c), 209(a), and 218(b), for the purpose of considering a change in the structure of the EEU. Accompanying the Department's petition was the 2008 Draft

10. Exh. Board-2.

11. Public Act 92, § 12 (2008 VT., Adj. Sess.).

12. Exh. VEIC-5.

13. Hamilton pf. at 11; Buckley pf. at 3.

Recommendation¹⁴, which the Department recommended serve as the starting point for this investigation.

On September 24, 2008, Conservation Law Foundation ("CLF") filed a Motion to Intervene. On September 25, 2008, International Business Machines Corporation ("IBM") filed a Motion to Intervene and a Motion for Admission of Counsel *pro hac vice* of Leonard H. Singer, Esq.

On October 1, 2008, the Board held a prehearing conference in this Docket. At the prehearing conference, no attendee objected to the previously filed motions. The Board granted permissive intervention to CLF and IBM and admitted Mr. Singer *pro hac vice*.

At the prehearing conference, attendees discussed whether this proceeding should be bifurcated, with the first phase focusing on the issue of whether a change in the EEU structure is warranted. If the Board decided to change the structure, then the docket would proceed to a second phase which would address details associated with the new structure. Prehearing conference attendees agreed that the discussion of bifurcation and resulting schedule should wait until parties had an opportunity to discuss settlement. Parties were given until December 1, 2008, to reach a settlement or to propose a schedule for the remainder of the proceedings.

In its October 29, 2008, Order on Motions to Intervene, the Board granted the following parties' requests to intervene: Associated Industries of Vermont ("AIV"); BED; Central Vermont Public Service Corporation ("CVPS"); Green Mountain Power Corporation ("GMP"); the Group of Municipal Electric Utilities ("GMEU");¹⁵ Vermont Electric Power Company, Inc. ("VELCO"); and Washington Electric Cooperative, Inc. ("WEC"). In its November 26, 2008, Order on Motion to Intervene, the Board granted the Vermont Marble Power Division of Omya, Inc.'s request to intervene.

14. Exh. VEIC-5.

15. GMEU includes: Barton Village Inc. Electric Department; Village of Enosburg Falls Water & Light Department; Town of Hardwick Electric Department; Village of Hyde Park Electric Department; Village of Jacksonville Electric Department; Village of Johnson Water & Light Department; Village of Ludlow Electric Light Department; Village of Lyndonville Electric Department; Village of Morrisville Water & Light Department; Village of Northfield Electric Department; Village of Orleans Electric Department; Town of Readsboro Electric Light Department; and Swanton Village, Inc. Electric Department.

On December 1, 2008, the Department filed with the Board a progress report on the settlement negotiations. The Department proposed to retain the services of a consultant with expertise in the area of public energy efficiency programs in order to evaluate the proposed EEU structure. The Department requested an additional six months in the schedule to hire a consultant and develop a report.

In its January 22, 2009, Order on Motion to Intervene, the Board granted VEIC's request to intervene.¹⁶

On January 29, 2009, the Board issued a scheduling order providing additional time for settlement negotiations. The additional time also provided the opportunity for the Department to retain the services of a consultant in order to evaluate the proposed EEU structure. Parties were given until April 24, 2009, to reach a settlement or to propose a schedule for the remainder of the proceedings.

On April 28, 2009, the Department filed with the Board a progress report on the settlement negotiations. The Department's filing included a draft report with its consultant's recommendations for the EEU structure.¹⁷ The Department proposed a draft schedule for the remainder of the proceedings that included time for the Department, with input from the parties, to develop a draft recommendation document.

On May 29, 2009, the Department filed a 2009 Revised Draft Recommendation for the EEU structure (referred to herein as the "2009 Draft Recommendation").¹⁸

On June 5, 2009, IBM filed a letter asking the Board to bifurcate this proceeding, such that the first phase would focus on the model to be used for the overall EEU structure (contract versus Order of Appointment), and the second phase would address the specifics of the selected model. In a June 19, 2009, Order, we concluded that this proceeding should not be bifurcated. As explained in the June 19 Order, this conclusion was based on: (1) our determination that it would be difficult for the Board to decide whether or not to change the EEU structure without

16. In its October 8 Prehearing Conference Memorandum, the Board agreed with attendees that VEIC would participate in the settlement negotiations while its motion to intervene was pending.

17. Exh. VEIC-9.

18. Exh. DPS-2.

evidence regarding what a new structure might look like; and (2) concerns regarding delaying the resolution of this proceeding.

Technical hearings were held on September 15 and 16, 2009. Prefiled testimony and exhibits filed by the following parties were admitted into the record: the Department; AIV; BED; CLF; CVPS; GMP; IBM; VEIC; and VELCO.¹⁹ Three Board exhibits were also admitted into the record.

On October 9, 2009, proposed findings and briefs were filed by the Department, BED, CLF, CVPS, IBM, and VEIC. On October 9, 2009, GMEU filed a letter joining in the proposed findings and brief of CVPS. On October 14, 2009, AIV filed a letter joining in the proposed findings and brief of IBM.

On October 23, 2009, reply briefs were filed by the Department, IBM, and VEIC. On October 23, 2009, AIV filed a letter joining in the reply brief of IBM.

IV. POSITIONS OF THE PARTIES

The Department favors a change in structure to an Order of Appointment provided that the new structure appears likely to promote the continued success of EEU programs while securing additional benefits to Vermont ratepayers.²⁰ The Department has proposed a "rolling appointment" structure with an initial 6-year appointment. The Department supports an assessment of the current EEU entities before the transition to the new Order of Appointment.

AIV does not support the Order of Appointment model; instead, it prefers to retain the current contract structure. AIV asserts that the terms of the current contract can be improved to enhance accountability and cost effectiveness, and that conducting competitive solicitations for the EEU contract every three years best serves the interests of ratepayers.²¹

BED desires to continue its appointment by the Board to serve as the EEU within the City of Burlington. For the EEU services for the remainder of the state, BED supports a transition to

19. One of the exhibits, VEIC-BH-4, is a third version of the Draft Recommendation document. This version is referred to herein as the VEIC Draft Recommendation.

20. Poor pf. at 3.

21. Driscoll pf. at 3.

an Order of Appointment model with a 12-year term. BED asserts that the change in structure will result in a more efficient EEU structure than presently exists.²²

CVPS supports a swift transition from the existing contract-based EEU structure to one based on an "order of appointment" as provided for under 30 V.S.A. § 209(d). CVPS is in favor of the issuance of an Order of Appointment in this proceeding for VEIC, and continuation of the appointment of BED within its territory, to serve as EEUs in order to reduce the cost of the transition to an Order of Appointment model and to speed the transition to the new structure.²³

CLF asserts that an Order of Appointment with an indefinite term is the option that best addresses the problems related to the EEU's current structure. To the extent that this is not allowed by the current statutory authorization, CLF recommends a 12-year Order of Appointment.²⁴ CLF supports the retention of the incumbent EEU entities during the initial Order of Appointment.²⁵

GMP supports the transition of EEU services to an Order of Appointment model with VEIC being awarded the initial appointment.²⁶ GMP also supports the 2009 Draft Recommendation presented by the Department which includes a 6-year initial appointment.²⁷

GMEU favors the transition of the EEU services to an Order of Appointment model. GMEU asserts that an Order of Appointment, with an appropriate series of checks and balances, will bring about improvements over the current structure.²⁸

IBM supports the continuation of the contract model and does not support the transition to an Order of Appointment. IBM asserts that conducting a competitive solicitation process every three years assures the Board and the residents of Vermont that the best approach to providing EEU services is selected at the least cost to all Vermont ratepayers.²⁹

22. Buckley pf. at 4.

23. Bentley pf. at 4.

24. Steinhurst pf. at 10.

25. Steinhurst pf. at 3.

26. Martin pf. at 4-5.

27. Martin pf. at 4.

28. Letter from David John Mullett of Vermont Public Power Supply Authority on behalf of GMEU, to Susan Hudson, Clerk of the Board, dated June 26, 2009.

29. Aldrich pf. at 1.

VEIC supports the provision of EEU services through an Order of Appointment as defined by the 2008 Draft Recommendation filed with the Board at the conclusion of the EEU Structure Working Group process.³⁰ VEIC asserts that the transition to a well-designed new EEU structure is prudent and timely. VEIC supports a 12-year cycle of reconsideration of the Order of Appointment, as well as a rolling 12-year appointment with a mid-term performance assessment.³¹

VELCO supports the Department's proposal to transition the EEU services to the model detailed in the 2009 Draft Recommendation. VELCO asserts that the concept of an Order of Appointment offers significant benefits.³²

WEC generally supports the form and structure as proposed in or modified by the Department's 2009 Draft Recommendation; however, WEC supports a 12-year appointment.³³ WEC does not support an initial assessment prior to the first appointment of the EEU under the proposed model.³⁴

V. ORDER OF APPOINTMENT MECHANISM

A. Overall EEU Structure

Findings

Current EEU Structure

1. The current EEU structure is a contract mechanism under which the Board contracts with an entity to administer energy efficiency services under the name "Efficiency Vermont." Poor pf. at 4-5.

2. The Board has twice conducted a competitive bidding process to select an entity to serve as the EEU under a series of three-year performance-based contracts with the Board. Poor pf. at 4; exh. Board-1 at 1.

30. Hamilton pf. at 13.

31. Hamilton pf. at 14; VEIC Brief at 1.

32. Frankel pf. at 2.

33. Letter from William Powell, WEC, to Susan Hudson, Clerk of the Board, dated June 23, 2009.

34. Letter from William Powell, WEC, to Susan Hudson, Clerk of the Board, dated June 23, 2009.

3. The Board's current contract with the entity serving as the EEU covers the years 2009-2011. Poor pf. at 4.

4. The current contract structure has provided numerous benefits to Vermont's ratepayers. The EEU's performance has exceeded expectations, and it has been recognized nationally as an innovative government program. In addition, Vermont has consistently been rated as having one of the best energy efficiency programs in the nation. Poor pf. at 5; Steinhurst pf. at 13-14; exh. Board-1 at p.1 of Task Statement for Discussion of EEU Structure (hereinafter "Task Statement").

5. Energy efficiency service delivery in Vermont is becoming more complex. For example, in addition to a continued emphasis on reducing Vermont's annual energy usage, the EEU is now directed to focus on statewide and geographically-targeted demand savings. The EEU also participates on behalf of the State in the ISO-NE Forward Capacity Market and it forecasts 20 years of electric efficiency savings. Pursuant to legislative direction, the EEU now offers efficiency services for unregulated fuels such as fuel oil, kerosene, and propane. Poor pf. at 6.

6. The EEU has worked in a fluid atmosphere since its inception. Efficiency markets have changed as consumers became more aware of energy efficiency through sustained program, government, and advocacy efforts. New and emerging technologies in some instances have become standard practice, and new building energy codes have taken effect or have been updated. Poor pf. at 6.

7. The expansion in the scope and complexity of services required of the EEU underscores the need for effective oversight and greater transparency and accountability. In addition, an increase in EEU stability is valuable to both the program administrator and the ratepayer as it can minimize uncertainty and allow for appropriate long-term planning and investments. Poor pf. at 6-7.

Challenges of the Current EEU Structure

8. The current three-year contract cycle has, operationally, posed problems and challenges, including:

- Reduction in the number of entities participating in a competitive bid process to serve as the EEU;
- Barriers to engaging fully in effective long-term planning;
- Uncertainty associated with participation in the ISO-NE Forward Capacity Market which requires bidding three years prior to the time of delivery;
- Potential conflict between the Board's quasi-judicial role and the Board's administrative role as EEU contract manager;
- Problems associated with the restrictions on EEU participation in Board proceedings; and
- Risk that statements of policy or opinion by the EEU will be attributed to the Board, based on the EEU's status as Board contractor.

Exh. Board-1 at p. 1-2 of Task Statement.

9. The competitive nature of the current structure is intended to ensure that an incumbent contractor continues to innovate and works to keep costs down while pursuing difficult but achievable goals of acquiring the greatest amount of cost-effective energy efficiency possible given the provided budget. Poor pf. at 7.

10. The current contract cycle may not provide adequate incentives to promote competitive bidding for the EEU contract. The fact that only two providers have bid on the EEU contract suggests that the contract structure did not encourage competitive suppliers to participate in the contract bidding process. Martin pf. at 3.

11. Because competition has diminished over time, the contract structure may not be the most reliable mechanism to encourage innovation and continued exemplary performance. Poor pf. at 7.

12. The lack of competition creates a situation where the incumbent energy efficiency provider has become a *de facto* monopoly. Poor pf. at 8.

13. While monopolies have long been permitted to exist in the provision of utility services, under such circumstances it is necessary to impose appropriate safeguards and to ensure effective oversight on behalf of ratepayers. The EEU structure should act as a vehicle for providing such oversight. Poor pf. at 8.

14. The three-year contract cycle does not permit the EEU to optimize planning, programming and commitments that could benefit Vermont consumers. It limits the EEU's

effectiveness in participating in long-term resource acquisition and forecasting because initiatives that require a longer-term time horizon or financing that extends beyond the contract period are more difficult. For example:

- With a three-year contract, financing of measures by the EEU is limited to the three-year period and use of potentially beneficial longer-term financing is effectively precluded.
- Efforts needed to re-bid or to renew a contract every three years take away from activities to acquire energy efficiency.
- Efficiency investments at the end of a contract period can be limited because of uncertainty about continued operation or support. The length of the contract affects the efficiency measures that will be acquired as the EEU has an inherent incentive to show savings during the term of its contract and would see little or no benefit from acquiring savings beyond its contract period.
- The contractor serving as the EEU is required to bid resources into the ISO-NE Forward Capacity Market that it has no certainty that it can or will acquire as it does not know if it will continue to operate as the EEU beyond the three-year contract.

Martin pf. at 3-4; Steinhurst pf. at 4-5.

15. As the EEU is more fully integrated into utility planning efforts through activities such as geographic targeting and the Vermont System Planning Committee,³⁵ the potential increases for conflicts between the Board's quasi-judicial role with respect to electric utilities and its administrative role with respect to the EEU. From an administrative perspective, this could make it increasingly difficult for the Board to function well in its role as contract manager. From a quasi-judicial perspective, restrictions on the EEU's participation in Board proceedings (which were considered necessary to avoid even the perception of a conflict of interest related to the specific issues under discussion due to the Board's special contractual relationship with one party) could become increasingly problematic. Exh. Board-1 at p. 1-2 of Task Statement.

Order of Appointment Structure

16. The Order of Appointment structure was initially developed by participants in a series of workshops that explored how Vermont might build upon the success to date of the EEU and

35. The Vermont System Planning Committee is described in Section VIA2, below.

potentially improve on it through an alternative structure. In this workshop process, participants identified strengths and weaknesses of the current EEU structure, compared possible alternative structures, and examined efficiency utility structures used in other states, among other topics. Hamilton pf. at 6, 10-11.

17. The 2008 Draft Recommendation is built on the premise of moving the EEU to a "franchise-like" Order of Appointment structure. The 2008 Draft Recommendation defines how the legal mechanism of such an Order of Appointment would apply, and details a "framework for planning, performance review, evaluation and ongoing appointment." Hamilton pf. at 11; exh. VEIC-5 at 1.

18. The 2009 Draft Recommendation and the VEIC Draft Recommendation are also built on the premise of moving the EEU to an Order of Appointment structure. Exh. DPS-2, *generally*; exh. VEIC-BH-4, *generally*.

19. An Order of Appointment would perform all the functions of the contract in the current EEU structure, including specification of EEU roles and responsibilities, administrative requirements and procedures, compensation, reporting, performance review, and termination. Hamilton pf. at 15.

20. An Order of Appointment structure would provide the following benefits:

- Enhance the oversight and accountability of an EEU by blending the existing successful performance-driven competitive model with more traditional regulated-utility cost-of-service-type regulation;
- Create predictable opportunities for the review of programs and EEU spending by the DPS, the Board, and other stakeholders, allowing for additional review at any other time for good cause;
- Enable the DPS and the Board to encourage better performance through the use of the same regulatory mechanisms that are used to improve service quality from traditional utilities;
- Increase stability in situations where an EEU demonstrates exemplary performance by avoiding unnecessary re-bid processes that have little prospect of soliciting competitive bids, but can nonetheless be highly disruptive to efficiency delivery efforts;
- Eliminate potential conflicts inherent in the Board's role as a contract manager by enabling the Board to operate solely as the administrative tribunal whose charge it is to ultimately decide the various energy efficiency

regulatory matters before it with the EEU, DPS and other parties presenting issues and providing testimony and comments in support of a particular result; and

- Increase transparency by eliminating private contract negotiations while also enabling greater participation from stakeholders in the process of setting performance indicators and providing a greater opportunity for input through an open Board process in which stakeholders may propose new ideas from different perspectives.

Poor pf. at 8-11.

21. A non-contractual relationship between the EEU and the Board, similar to the one that exists between other utilities and the Board, would help eliminate the potential conflicts that exist as a result of the present relationship between the EEU and the Board, and would enable the EEU to participate fully in regulatory proceedings involving energy efficiency and integration with utility planning and responsibilities. Steinhurst pf. at 7.

22. An Order of Appointment structure would create a relationship between the Board and the EEU that would be consistent with the regulatory relationship that exists between the Board and electric utilities. This structure would put the Board in its familiar and customary quasi-judicial role; it also would put the DPS in its familiar and customary role as a ratepayer advocate in regulatory proceedings involving the Board and the EEU. Hamilton pf. at 32.

23. An Order of Appointment similar to a franchise or award of a Certificate of Public Good that is provided for other utilities in Vermont would build on the existing structure for utility regulation, avoid "reinventing the wheel," and incorporate the oversight that is in place for utilities operating in Vermont. Steinhurst pf. at 10.

24. Under an Order of Appointment, all EEUs would be treated as regulated providers (like BED is today), rather than as a contractor as is currently the case for VEIC. As a result, interested stakeholders would be able to participate in transparent proceedings before the Board with respect to all matters concerning an EEU's provision of services including the establishment of EEU goals and budgets, and the periodic assessment of the EEU's performance. Bentley pf. at 18.

25. An Order of Appointment structure would establish a process for the administration of the EEU that is more open and accountable than the current process of negotiating the EEU's goals and objectives as part of the Board's contract formation process. Bentley pf. at 18.

Discussion

Vermont law requires the Board to:

provide for the development, implementation, and monitoring of gas and electric energy efficiency and conservation programs and measures including programs and measures delivered in multiple service territories, by one or more entities appointed by the board for these purposes.³⁶

Vermont law further provides that the Board may appoint such an entity :

. . . by contract or by an order of appointment. An appointment, whether by order of appointment or by contract, may only be issued after notice and opportunity for hearing. An order of appointment shall be for a limited duration not to exceed 12 years, although an entity may be reappointed by order or contract. An order of appointment may include any conditions and requirements that the board deems appropriate to promote the public good. For good cause, after notice and opportunity for hearing, the board may amend or revoke an order of appointment.³⁷

The central issue in this proceeding is whether the EEU structure should be changed from one based on a short-term contract to one based on an Order of Appointment. BED, CVPS, CLF, the DPS, GMP, GMEU, VEIC, and VELCO support a change to an Order of Appointment structure, while AIV and IBM oppose such a change, supporting instead the continuation of the current contract structure.³⁸

The DPS, GMP and IBM explicitly recognize that the current contract structure has served Vermont well and provided numerous benefits to Vermont ratepayers.³⁹ We concur. The EEU was a new energy efficiency delivery mechanism at the time it was created. There was no incumbent, and issuing a competitive solicitation proved an effective and efficient means of

36. 30 V.S.A. § 209(d)(2).

37. 30 V.S.A. § 209(d)(5).

38. Buckley pf. at 4-5; Bentley pf. at 7; Steinhurst pf. at 8-10; DPS Brief at 12; Martin pf. at 4; letter from David John Mullett of Vermont Public Power Supply Authority on behalf of GMEU, to Susan Hudson, Clerk of the Board, dated October 9, 2009; Hamilton pf. at 13; Frankel pf. at 2; Driscoll pf. at 3; Aldrich pf. at 10.

39. See, e.g., Poor pf. at 5; Martin pf. at 2; IBM Brief at 4.

selecting an energy efficiency provider to serve as the EEU. In addition, the short-term contract enabled the Board to make operational adjustments to the EEU program as all entities involved gained experience with this novel delivery mechanism. Today, the EEU is widely regarded as one of the leading energy efficiency programs in the country.⁴⁰

However, circumstances have changed in the nearly 10 years that the EEU has been in operation and the Board has gained considerable practical experience with this energy efficiency delivery mechanism. As a result, we are convinced that the current EEU structure has shortcomings related to the short duration of the contract and the conflict between the Board's quasi-judicial function and its role as a party to the contract.⁴¹ The Board's administrative function as EEU contract manager is, at times, inconsistent with its quasi-judicial role. In addition, the three-year contract cycle limits the EEU's effectiveness in long-term resource acquisition and forecasting for Vermont.

AIV challenges many of these shortcomings. First, it argues that it is unclear how the concerns raised regarding the contractual nature of the relationship between an EEU and the Board call for abandoning the contract model. AIV asserts that no evidence has been presented regarding how the potential for conflicts between the Board's quasi-judicial and administrative roles in matters involving the EEU has prevented the EEU from fulfilling its purpose and achieving its goals, or how any docket or other proceeding before the Board has been compromised.⁴² This argument is not persuasive. As long as the Board is required to act in both a quasi-judicial role and a contract-administrator role, it will encounter situations where the two roles conflict. Some examples of such situations that have already arisen are: (1) during contract negotiations when subjects of contested cases arise, Board staff must leave the room to avoid ex parte communications; (2) the EEU has been prohibited from intervening as a party in proceedings before the Board to avoid even the perception of a conflict of interest related to the specific issues under discussion due to the Board's special contractual relationship with one party; and (3) the potential for confusion regarding whether the EEU is speaking for itself, or for

40. See finding 4, above.

41. See findings 8-15, above.

42. Driscoll pf. at 3-4.

the Board as its contractor, when it takes positions on regional market issues in regional forums.⁴³ We are concerned that because of the improved integration of EEU activities into electric utility planning efforts, the potential for conflicts will increase. While the Board and its staff have conscientiously worked to ensure that the Board's quasi-judicial role is not compromised, this has at times come at the expense of the Board's oversight of the EEU (such as when Board staff leave contract negotiations so issues related to contested cases can be discussed). The only way to completely remove the conflicts is to eliminate the Board's role as contract manager.

Second, AIV argues that despite the restrictions on the EEU's provision of policy advice and lobbying activities, AIV has witnessed debates before the Legislature and the Board where lobbying has occurred and advice has been delivered from all perspectives, including those presumably shared by the EEU.⁴⁴ Thus, AIV sees no harm from continuing these restrictions on the EEU's behavior. In contrast, BED asserts that the limitations on VEIC's participation in contested-case proceedings before the Board as well as before state and regional bodies on policy matters have meant that VEIC's knowledge and expertise have not always been allowed to inform the debate.⁴⁵ BED's concern here is a valid one: excluding VEIC's input from important public-policy debates is not necessarily in the best interests of the State. Therefore, we do not accept AIV's assertion that the restrictions on the EEU's behavior are not problematic.

Third, AIV asserts that there is no evidence that complex programs are more easily overseen and regulated under an Order of Appointment instead of a contract.⁴⁶ We conclude that the issue is not whether complex programs are more easily overseen, but whether they are more *appropriately* overseen and regulated under an Order of Appointment than a contract. In the contract model, many discussions take place in private negotiating sessions among the Board, the EEU contractor, and the DPS. As proposed, the Order of Appointment structure would move many of those discussions to public processes that would allow all interested stakeholders to participate. As the EEU has become increasingly complex (with, for example, the initiation of

43. Exh. Board-1 at p. 1-2 of Task Statement.

44. Driscoll pf. at 4.

45. Buckley pf. at 3.

46. Driscoll pf. at 3.

geographic targeting and the delivery of heating and process-fuel efficiency), the number of policy issues related to the program has also increased. It is in the public interest for Board determinations regarding these policy issues to be made after open discussion and full stakeholder participation, rather than in private negotiating sessions.

Fourth, AIV challenges the assertion that effective long-term planning requires longer terms. AIV may be correct that long-term planning is often performed by government and private sector entities that do not enjoy long-term job security or certainty.⁴⁷ However, in Vermont electric utilities have a franchise with an indefinite term. Energy efficiency is a utility service that, pursuant to 30 V.S.A. §218c, must be integrated into utility planning activities. Accomplishing this has been challenging under the short-term contract structure.

Fifth, AIV asserts that the recent decline in the number of entities that responded to a competitive solicitation to serve as an EEU does not justify changing the EEU structure. According to AIV, there is a "value of competitive discipline" that comes from exposing a current appointee or contractor to competition regardless of how many competitors actually respond to a competitive solicitation.⁴⁸ AIV argues that energy efficiency is a growing and maturing field, and that there is every reason to expect that there will be greater competition from various entities going forward. According to AIV, establishing a structure that has credible and frequent opportunities for competition should encourage greater interest and participation from other entities.⁴⁹ This argument is unconvincing because it ignores the advantages possessed by an incumbent, as long as the incumbent continues to achieve exemplary performance. These incumbent advantages include an infrastructure of intellectual capital resulting from: a staff of locally experienced program designers and implementers; developed affiliations with distributors, retailers and installers of energy-consuming appliances and systems; commitments with building contractors; and relationships with ratepayers.⁵⁰

These incumbent advantages are also the reason we do not accept IBM's and AIV's argument that the benefits of a competitive solicitation automatically outweigh the costs of such

47. Driscoll pf. at 7.

48. Driscoll pf. at 7.

49. Driscoll pf. at 7.

50. Poor pf. at 7-8.

a solicitation. IBM contends that the cost of a competitive solicitation, which it estimates to be between \$100,000 and \$150,000, is minimal when compared to the three-year budget for the EEU.⁵¹ IBM and AIV conclude that the cost of a competitive solicitation "is a small price to pay to ensure that the State of Vermont and its ratepayers are receiving the best program and projects for the amount of money invested."⁵²

We recognize that the costs of a competitive solicitation are small when compared to the EEU's budget. Nevertheless, we conclude that, because of the incumbent advantages possessed by an EEU, as long as that EEU continues to achieve exemplary performance, it is unlikely that firms will attempt to compete against the incumbent.⁵³ In this situation, when a competitive solicitation has little prospect of soliciting competitive bids, there is little value to conducting the solicitation. Eliminating these unproductive solicitations does reduce a significant administrative burden for the Board, the DPS, and other stakeholders, allowing them to focus on effective assessment and innovations that increase ratepayer benefits.⁵⁴

Finally, both IBM and AIV dispute the assertion that the current contract model is an impediment to the EEU's participation in the ISO-NE Forward Capacity Market. Instead, they argue that Efficiency Vermont has successfully participated in this market and there is no reason to believe that such successful participation will not continue into the future.⁵⁵ They contend that any issues associated with aligning the term of the EEU with obligations under the Forward Capacity Market could be addressed by requiring any successor EEU entity to assume and be fully responsible for all Forward Capacity Market obligations of the predecessor entity.⁵⁶

IBM and AIV are correct that VEIC, the current Efficiency Vermont contractor, has successfully participated in the ISO-NE Forward Capacity Market. However, as VEIC argues, the Board's current contract with VEIC includes "some fairly awkward, I would call them, band-aid mechanisms . . . that involve hoping that something can be worked out where a subsequent

51. Aldrich pf. at 12. In this proceeding the DPS estimated that an initial six-year appointment for an EEU could conservatively be valued at \$200 million. Poor pf. at 19.

52. IBM Brief at 7.

53. Poor pf. at 7-8.

54. Poor pf. at 10.

55. Driscoll pf. at 6; IBM Brief at 7.

56. IBM Brief at 7-8.

contractor would be able to assume [the outstanding Forward Capacity Market] obligations. . . ."⁵⁷ In addition, in our role as the EEU contract manager, we are aware that there have been difficulties related to the provision of financial assurance as required by ISO-NE as a condition of participation in the market.⁵⁸ Thus we conclude that the current contract structure has, in fact, made the EEU's participation in the Forward Capacity Market more difficult.

AIV also argues that participation in the Forward Capacity Market is not an essential activity of the EEU, and it would be inappropriate to change fundamentally the EEU structure just to accommodate such participation, even if it was necessary, particularly if the benefits of competition and other positive attributes are compromised.⁵⁹ This is a valid argument; facilitating the EEU's participation in the Forward Capacity Market should not be the primary consideration when determining an EEU structure. Nonetheless, we recognize that Vermont law requires the Board and the DPS to advocate in regional and federal venues for comparable treatment of all resources, including energy efficiency, generation transmission and demand response resources.⁶⁰ In addition, 30 V.S.A. § 209(d)(7) provides that the net revenues above costs associated with payments from ISO-NE for capacity savings resulting from the activities of the EEU shall be used by the EEU to deliver energy efficiency services to heating and process-fuel customers. Therefore, it is appropriate to consider facilitating the EEU's participation in the Forward Capacity Market as one of many benefits that will result from an Order of Appointment, as we do in this Order.

We conclude that, as the DPS, BED, CLF and VEIC contend, an Order of Appointment structure would address the shortcomings of the current contract structure in two ways.⁶¹ First, in an Order of Appointment structure, the conflicts between the Board's quasi-judicial role and its

57. Tr. 9/15/09 at 229 (Plunkett).

58. Under ISO-NE's rules, financial assurance must be posted at the time a bid is accepted. If certain performance milestones are met, the financial assurance will be returned. This process is complicated when a contract ends between the time the financial assurance is posted and the time it is returned.

59. Driscoll pf. at 6-7.

60. Public Act No. 61, § 8 (2005 Vt., Bien. Sess.).

61. VELCO also asserts that an Order of Appointment structure "addresses the issues raised by the Board in opening the docket." Frankel pf. at 2.

role as the EEU contract manager would be eliminated.⁶² The Board could function solely in its quasi-judicial role and exercise independent oversight as it does with other utilities. This would allow the EEU to take positions without concern that these positions would be attributed to the Board. Second, an Order of Appointment, if for a sufficiently long period of time, would provide the EEU with a more stable, multi-year budget and planning horizon and support the EEU's participation in the ISO-NE Forward Capacity Market.⁶³ These two changes, coupled with recent statutory changes regarding the Board's jurisdiction over an entity designated as an EEU by an Order of Appointment,⁶⁴ and enhanced reporting and evaluation requirements will result in a more effective EEU structure than presently exists.⁶⁵ We also recognize that an Order of Appointment structure will have other benefits as listed in finding 20, above.

The DPS notes that there are some potential drawbacks to an Order of Appointment, including: a lack of incentives for an appointee to perform at a high level; a risk that ratepayers would be locked into an appointment with an underperforming appointee; an appointee's limited interest in innovation and new ideas; and less incentive for an appointee to manage costs.⁶⁶ IBM and AIV agree with these potential drawbacks and assert that there are additional disadvantages to the Order of Appointment structure, including that it does not ensure that the least-cost solution has been selected, it ignores the possibility of new innovative ideas from other potential suppliers, it can lead to complacency on the part of the efficiency provider, and it is risky because the state has limited experience with Orders of Appointment.⁶⁷

The potential drawbacks identified by the DPS can be addressed by incorporating appropriate design features in an Order of Appointment. First, the establishment of budgets and overall goals in a transparent public process will ensure fair and reasonable targets with broad stakeholder involvement. Second, measurement and savings verification combined with a cost-plus performance-based compensation mechanism and regular performance assessments and

62. Steinhurst pf. at 8-9; Poor pf. at 10-11.

63. Hamilton pf. at 13.

64. See, 30 V.S.A. § 209(d)(6).

65. Buckley pf. at 4.

66. Poor pf. at 12; Fratto pf. at 3-4.

67. IBM Brief at 6.

comparisons to past or equivalent existing service delivery mechanisms will help ensure excellent performance. Third, allowing termination of an Order of Appointment at any time for good cause will mitigate the risk that ratepayers would be locked into an appointment with an underperforming appointee.⁶⁸

The public process for setting budgets and performance goals should also provide a significant incentive for an appointee to manage its costs. While EEU budgets have always been set in an open process, under an Order of Appointment structure, for the first time, performance goals will also be set in a public process. Public participation in the goal-setting process should increase the pressure on an appointee to manage its costs. Therefore, we encourage any interested party to participate in the budget and goal-setting proceedings.

Several of the design features mentioned above will also address some of the disadvantages of an Order of Appointment that were identified by IBM and AIV. For example, regular performance assessments and comparisons to past or equivalent existing service delivery mechanisms will reduce the risk that an efficiency provider will become complacent, and will ensure that innovative ideas from efficiency providers in other states are identified and considered for implementation here in Vermont. Such performance assessments will also help ensure that Vermonters are receiving least-cost service.

IBM and AIV assert that Vermont has limited experience with Orders of Appointment. However, as BED notes, the Board originally issued an order appointing BED to deliver EEU services in its service territory.⁶⁹ The situation is not entirely similar because BED was (and is) a "company" subject to the Board's jurisdiction under Title 30, while VEIC was not. However, in 2008, the Legislature amended 30 V.S.A. § 209(d)(6) to make an entity that is appointed as an EEU and not already regulated under Title 30 subject to several provisions of Title 30 to the same extent as a "company." In addition, an Order of Appointment is very similar to a Certificate of Public Good that the Board issues to other entities authorizing them to provide utility services in Vermont. Just like the proposed Order of Appointment, some such Certificates

68. Poor pf. at 12-13; Fratto pf. at 4.

69. Buckley pf. at 4-5.

of Public Good have fixed terms and include a variety of operating requirements and other conditions that the utility must meet.

Overall, we find that the advantages of an Order of Appointment structure outweigh the disadvantages. Therefore, we conclude that it is in the public good to change the EEU structure from the current contract structure to an Order of Appointment structure.

In reaching this conclusion, we recognize the need to carefully design this new structure to mitigate potential risks associated with the change. Many of these critical design features are addressed in the following sections of this Order. Other aspects of the new structure are addressed in the same way in all three Draft Recommendations,⁷⁰ and no party has contested them. Still other aspects are addressed at only a high level, and the three Draft Recommendations assert that there is a need for additional process to fully address those areas.

As a result, we are appointing a Hearing Officer to conduct further proceedings in a second phase of this Docket with the goal of developing a proposed Order of Appointment. We expect the proposed Order of Appointment to be consistent with our decisions in this Order: parties should not expect us to revisit the issues we decide today as a result of those further proceedings. We also expect the proposed Order of Appointment to incorporate the aspects of the three Draft Recommendations that have not been challenged by any party during this phase of the Docket.⁷¹ With respect to those aspects of the Draft Recommendations that have been contested, but which we determine in today's Order require further proceedings to address,⁷² we instruct the Hearing Officer to consider all arguments, including those already made, in those further proceedings.

B. Term of Appointment

70. The three Draft Recommendations include the 2008 Draft Recommendation (which was developed in the EEU Structure Working Group, filed with the DPS's petition requesting that the Board open this proceeding, and admitted into evidence as exh. VEIC-5), the 2009 Draft Recommendation (which was filed by the DPS on May 29, 2009, and admitted into evidence as exh. DPS-2), and the VEIC Recommendation (which was filed with VEIC's direct testimony and admitted into evidence as exh. VEIC-BH-4).

71. These aspects include general terms and conditions related to the appointment, certain EEU roles and responsibilities, and various EEU administrative functions, among others.

72. *See*, Section VIB, below.

Findings

26. A long-term appointment, such as 12 years, offers a number of advantages including:

- program stability;
- allowing the EEU to make longer-term productive financial and partnership commitments;
- greater incentive to focus on comprehensive energy efficiency programs and market-transformation strategies;
- better alignment with the EEU's responsibility in the ISO-NE Forward Capacity Market;
- better alignment with the EEU's role in long-term planning and forecasting by Vermont utilities, including participation in the Vermont System Planning Committee; and
- greater consistency with the requirement that the EEU maintain capabilities to respond to Vermont utilities' requests for Distributed Utility Planning and implementation.

Fratto pf. at 3; Hamilton pf. at 13-14.

27. Requiring an EEU to engage in a reappointment process every three years unnecessarily distracts the EEU from its mission to deliver energy efficiency services to Vermont ratepayers.

Buckley pf. at 5.

28. Potential disadvantages of a 12-year term include being locked into an appointment with an ineffective or high-cost appointee, lack of incentive for an appointee to perform, limiting innovation and new ideas that might be brought by competition, and the need for greater oversight. Fratto pf. at 3-4.

29. The disadvantages of a 12-year term can be addressed through scheduled and Board-initiated (for good cause) performance assessments, the budget and goal-setting process, DPS measurement and verification, and a cost-plus performance-based compensation mechanism. Fratto pf. at 4.

30. Under a 12-year Order of Appointment, the Board would have numerous opportunities to ensure that an EEU obtains the maximum amount of cost-effective energy efficiency available. These opportunities could include:

- monthly, quarterly and annual reports by an EEU on its activities;

- the triennial independent audit of an EEU's reported energy and capacity savings and the cost-effectiveness of the EEU's programs;
- triennial reviews and adjustments to the linkage between an EEU's compensation and verified savings in energy usage and demand;
- the setting, reviewing and resetting of performance indicators every three years;
- an Overall Performance Assessment every six years; and
- the Board's statutory authority to revoke or amend an Order of Appointment for "just cause" at any time.

Buckley pf. at 6.

31. The advantages of a 12-year term outweigh the disadvantages. Tr. 9/15/09 at 168 (Fratto).

32. End-of-cycle effects refer to those issues that arise with the approaching end of a contract term. As the end of the term approaches, uncertainty and the associated risk may become barriers to real commitment on the part of the EEU to responsibilities that require a longer-term perspective such as long-term planning, participation in the ISO-NE Forward Capacity Market, "pipeline projects,"⁷³ market transformation, and staffing. Fratto pf. at 10.

33. A long-term appointment has the same end-of-cycle effects as a short-term contract, but they occur less frequently. Fratto pf. at 10.

34. In a "rolling appointment" structure, the Board could renew an existing EEU's appointment in the middle of that appointment term, if justified by the results of a performance review. Poor pf. at 14; exh. DPS-2 at 23.

35. A rolling appointment would allow an appointment to continue as long as the EEU continues to meet or exceed performance expectations. This would allow end-of-cycle effects to be avoided. Fratto pf. at 10; tr. 9/15/09 at 39-40 (Poor); tr. 9/15/09 at 118 (Steinhurst).

36. A 12-year rolling appointment would eliminate end-of-cycle effects. Tr. 9/15/09 at 76 (Poor); tr. 9/15/09 at 118 (Steinhurst).

73. Many large energy efficiency projects, particularly those that involve construction, are multi-year projects. Projects that are in process but will not be complete by the end of a contract term are considered to be "pipeline projects."

Discussion

Section 209(d)(5) of Title 30 provides, in relevant part, that: "An order of appointment shall be for a limited duration not to exceed 12 years, although an entity may be reappointed by order or contract."

Parties' recommendations regarding the term of an Order of Appointment differ significantly. AIV and IBM contend that the term should be three years.⁷⁴ The DPS and GMP recommend a rolling six-year appointment with a mid-term performance assessment, although GMP also asserts that a rolling 12-year appointment with benchmarking reviews at three and nine years "may be a fair compromise."⁷⁵ BED, VEIC, and WEC assert that the term should be 12 years;⁷⁶ although BED and VEIC also support a rolling 12-year appointment with a mid-term performance assessment.⁷⁷ CVPS asserts that a rolling 12-year appointment is a "pretty interesting compromise" between an arrangement that is too short to allow an EEU to be able to convince a customer that it will be around for a long time, and an arrangement that is so long that an EEU becomes complacent.⁷⁸ CLF recommends an indefinite term but, since it recognizes that this is not allowed by statute, proposes that the term should be 12 years and the Board should direct utility parties and the DPS to work together to recommend statutory changes to allow an indefinite term.⁷⁹

IBM contends that three years is a sufficient length to plan and implement energy efficiency projects and evaluate results. It asserts that significant changes are expected to occur in energy efficiency services in the next few years, in part because of the availability of new technologies such as smart grid. Therefore, according to IBM, the Board should retain the flexibility to select every three years the energy efficiency service provider whose capabilities best match Vermont's changing needs. IBM also contends that a three-year appointment would provide a more appropriate level of accountability to ratepayers than a longer-term appointment,

74. Driscoll pf. at 5; Aldrich pf. at 13.

75. Poor pf. at 13-14; Martin pf. at 4; tr. 9/16/09 at 134-135 (Martin).

76. Buckley pf. at 5; Hamilton pf. at 19; letter from William Powell, WEC, to Susan Hudson, Clerk, Board, dated June 24, 2009.

77. VEIC Brief at 18; tr. 9/16/09 at 149 (Buckley).

78. Tr. 9/16/09 at 121-122 (Bentley).

79. Steinhurst pf. at 10.

given the size of the expenditure on the EEU's energy efficiency services. IBM asserts that a three-year Order of Appointment would differ from a three-year contract because the appointment model would not require a competitive solicitation every three years.⁸⁰

AIV contends that extending the term beyond three years raises concerns about: (1) the potential for complacency on the part of both the appointees and regulators; (2) adequate incentives for strong performance and continuous improvement; (3) the appropriate level of financial risk for underperformance; and (4) losing out on the opportunities for competition in a rapidly evolving field. AIV also argues that an overarching goal of EEU activities should be market transformation and related changes in behavior, practices, and market products and services such that many, and perhaps eventually all, EEU services are no longer necessary. AIV asserts that the longer a term of appointment, the more difficult this result would be, should the need for services end before the expiration of a term.⁸¹

We find these arguments unconvincing for the following reasons: First, as we discussed in Section VA, above, one of the major drawbacks of the three-year contract structure was the short-term nature of the contract.⁸² This drawback would not be effectively addressed by a change to a three-year Order of Appointment. In addition, requiring an EEU to engage in a reappointment process every three years unnecessarily distracts the EEU from its mission to deliver energy efficiency services to Vermont ratepayers.⁸³ Furthermore, we conclude in this Order that the Board should have the ability to terminate an EEU's appointment at any time if it chooses to no longer use an EEU to provide energy efficiency services; this addresses AIV's concern that the need for EEU services could end before the expiration of a term. However, as discussed further in Section VC, below, we do conclude that an appropriate level of review of an EEU's performance should occur on a three-year basis in order to ensure effective regulation that can act as a proxy for the incentives that flow from a competitive marketplace.⁸⁴

80. Aldrich pf. at 13-14.

81. Driscoll pf. at 5-6.

82. *See*, finding 14, above.

83. Buckley pf. at 5.

84. Fratto pf. at 11.

We also do not adopt CLF's recommendations that we: (1) find that an indefinite term is the preferred structure; (2) find that a 12-year term is a "second-best outcome;" and (3) direct the utility parties and the DPS, along with any other parties who wish to participate, to "work together to recommend" the statutory revisions necessary to allow an indefinite term.⁸⁵ CLF contends that the EEU has demonstrated by its past successful performance and its contract renewals that it is capable of operating for an indefinite term, and while initially there may have been a reason for a limited term because it was a novel structure for delivery of efficiency services, there is no longer a reason to provide the EEU with a different term than its electric utility peers.⁸⁶ In making these recommendations, CLF has misconstrued the Board's authority. The Board has no authority to require any entity to "work together to recommend" statutory changes. Any party (other than VEIC, which does face some restrictions under the terms of its contract with the Board) may advocate at the Legislature for whatever positions it chooses. Furthermore, we are not persuaded at this time that an indefinite term would be superior to the 12-year rolling term discussed further below since the 12-year rolling term also removes end-of-cycle effects while providing for regular performance reviews. Therefore, we decline to adopt CLF's recommendations regarding the term of an Order of Appointment.

In addition, we decline to adopt a rolling six-year appointment, with a mid-term performance assessment, as recommended by the DPS. We are not persuaded by the assertions of the consultant hired by the DPS to review the 2008 Draft Recommendation that (1) the length of an appointment could be reduced to something less than the proposed 12 years, but greater than 6 years, without significant loss of benefits;⁸⁷ and (2) a six- to eight-year term should be sufficient to achieve the identified program stability benefits.⁸⁸ Instead, we find a six-year appointment too short to fully address all end-of-cycle effects. With a six-year appointment, the mid-cycle performance review would occur in year 4, and an EEU would have approximately two years remaining in its appointment when a determination was made regarding its possible extension. Since bids are placed in the Forward Capacity Market three years prior to the date on

85. Steinhurst pf. at 10.

86. Steinhurst pf. at 9-10.

87. Fratto pf. at 3-4.

88. Fratto pf. at 9.

which the efficiency resources must be delivered, at least one of every four years the EEU would be bidding for a time period beyond the end of its current appointment.

Therefore, for the reasons set forth below, we determine that an EEU should be appointed to an initial rolling 12-year term. Long-term appointments, such as 12 years, have several benefits, as listed in finding 26, above.⁸⁹ A term closer to 12 years in length (the maximum term allowed by statute) would deliver the "maximum benefits" under the new structure.⁹⁰ Such a longer-term Order of Appointment would: (1) better match an EEU's planning horizon; (2) enable an EEU to focus more on Vermont's articulated long-term energy efficiency objectives; (3) encourage an EEU to develop longer-term relationships with customers, as well as upstream partners such as electrical-equipment manufacturers and suppliers, with greater focus on achieving the maximum amount of cost-effective savings over time, rather than short-term savings to meet current three-year goals; and (4) provide additional flexibility for an EEU when undertaking significant new initiatives, such as geographic targeting.⁹¹

In addition, we have experience with similar appointment terms for other utilities. Pursuant to 30 V.S.A. § 504(a), certificates of public good for cable television utilities are for a term of 11 years. As previously stated, such certificates of public good are very similar to Orders of Appointment.

We also adopt the DPS's proposal for a rolling appointment with a mid-term performance review. Under this proposal, the rolling appointments would continue as long as the appointee performs well.⁹² A rolling appointment model addresses end-of-cycle effects.⁹³ In addition, a rolling appointment model offers an EEU greater stability, assuming its performance reviews remain positive, since there is no presumption that the Board would initiate a competitive solicitation at the end of a cycle.⁹⁴ However, because we determine that the initial appointment

89. Buckley pf. at 5; Hamilton pf. at 19-22; Fratto pf. at 3.

90. Tr. 9/15/09 at 168 (Fratto).

91. The Board authorized geographic targeting in August 2006 and identified the targeted areas in January 2007. This gave Efficiency Vermont only a short period of time to plan, staff, implement the program, and demonstrate meaningful results before the end of the 2006-2008 contract period. Hamilton pf. at 19-21.

92. Poor pf. at 14.

93. Fratto pf. at 10; tr. 9/15/09 at 118 (Steinhurst); tr. 9/16/09 at 101 (Plunkett).

94. Fratto pf. at 10; Poor pf. at 16.

term should be 12 years, the initial mid-term performance review would occur after six years (in approximately the second half of year seven, as explained further in Section VC, below), rather than after three years of a six-year term, as proposed by the DPS.

The timing of this mid-term performance review affects the length of subsequent "renewal" appointments. It is important for an EEU's appointment term to be synchronized with the three-year performance periods described in Section VIIC, below. Because the initial mid-term performance review will occur in approximately the second half of year seven, "renewal" appointments would likely need to be for 11 years in order to maintain this synchronization. Therefore, we determine that the term of an initial Order of Appointment should be 12 years, with renewal Orders of Appointment lasting for approximately 11 years. In addition, we find that the mid-term performance review during a renewal Order of Appointment should occur after five years (in approximately the second half of year six); because the start of the renewal Order of Appointment is one year later than the start of the performance period, year six of a renewal Order of Appointment is the same point in the performance-period cycle as year seven of an initial Order of Appointment.⁹⁵

C. Performance Review Structure

Findings

37. An Order of Appointment structure should incorporate mechanisms that allow for timely and effective evaluation of an EEU's performance. Steinhurst pf. at 7.

38. An Order of Appointment should provide for several types of review of the EEU's performance, including:

- Establishment and review of specified performance indicators and applicable minimum requirements (performed at least every three years);⁹⁶
- Annual certification by the DPS regarding whether an EEU has achieved or made appropriate interim progress toward the established performance indicators, whether an EEU is satisfactorily executing its responsibilities that

95. Under this schedule, the first mid-term performance review would occur in the second half of year seven, while all subsequent mid-term performance reviews would occur in six-year intervals unless, as discussed further in Section VC, below, the Board initiates a performance review earlier.

96. The establishment of performance indicators is discussed further in Section VIIC, below.

are not directly measured by performance indicators, and whether an EEU's performance relative to performance indicators is consistent with the portion of the three-year budget that has been expended;

- Benchmarking an EEU's performance compared to the providers in other jurisdictions, normalizing for program maturity, funding, demographics, and other important variables (performed every three years);
- Overall Performance Assessment ("OPA") of an EEU's performance (performed at least every six years);
- Independent third-party audit of the reported energy and capacity savings and cost-effectiveness of EEU services (performed every three years);⁹⁷
- Ongoing opportunity to consider revoking the appointment if performance is poor; and
- Ongoing monitoring, savings verification and evaluation by DPS.⁹⁸

Hamilton pf. at 15-16; Poor pf. at 15; exh. DPS-2 at 16, 18-27; tr. 9/15/09 at 126 (Steinhurst).

39. As part of an Order of Appointment, the DPS should certify annually whether an EEU appears to be performing satisfactorily and should be allowed to continue to execute its duties. Aldrich pf. reb. at 26.

Benchmarking Review

40. In the quickly changing efficiency market, it is important to ensure that Vermont's programs compare well to other programs. Benchmarking is an appropriate tool to ensure that that happens. Tr. 9/15/09 at 24-25 (Poor).

41. A benchmarking review would look at specific best practices and the achievements of the top performers in the country or possibly in the world. Tr. 9/15/09 at 142-143 (Steinhurst).

42. The results of a benchmarking review would be useful when setting performance indicators. Tr. 9/15/09 at 29, 74 (Poor); tr. 9/15/09 at 126-127, 130 (Steinhurst); tr. 9/15/09 at 219 (Hamilton).

43. Conducting a benchmarking study every three years as part of the establishment of performance goals would reveal any examples of substantially better performance by other

97. This audit is required by 30 V.S.A. § 209(e)(12).

98. The DPS's monitoring, savings verification and evaluation activities are discussed further in Section VIII B3, below.

providers. Anyone who was concerned about this could then request an investigation. Tr. 9/15/09 at 142 (Steinhurst).

44. A benchmarking review should take four to six months to complete. Tr. 9/15/09 at 27 (Poor).

45. The current version of the DPS's draft EEU evaluation plan for 2009-2011 includes a benchmarking exercise. However, this evaluation plan has not yet been fully reviewed or approved. Tr. 9/15/09 at 24 (Poor).

Overall Performance Assessment

46. As described in the 2009 Draft Recommendation, an Overall Performance Assessment ("OPA") would be a public performance review process conducted by the Board to determine if there are probable net benefits from going to the market to consider offers from alternate implementation entities. An OPA would include:

- Consideration of the record of the appointed entity in meeting three-year performance indicators for the past two review cycles;
- Consideration of the relative benchmarks of entities conducting similar efficiency resource acquisition efforts in other jurisdictions, using appropriate indicators of relative performance;
- Notice to the public that the Board is conducting an OPA of an EEU and soliciting comment from the public on an EEU's performance;
- A review of trends in the overall efficiency of the appointed entity's performance, considering the entity's historical record using indicators such as overall yield (i.e., MWh/\$ and MW/\$); and
- Consideration of any other market information that may be useful in comparing the appointed entity's performance to what might be available from an alternate entity, for example, bids made for comparable resources in the regional forward capacity market.

Exh. DPS-2 at 21-22.

47. As part of an OPA, the Board would provide any EEUs, the DPS, Vermont electric utilities and other stakeholders sufficient opportunity to submit comments and utilize the workshop process on the performance review. Exh. DPS-2 at 22.

48. At the conclusion of the OPA, the Board would issue a finding regarding whether there is cause to go to the market to solicit proposals from alternate entities that might provide greater net benefits to Vermont ratepayers relative to a currently appointed EEU. Exh. DPS-2 at 22.

49. As described in the 2009 Draft Recommendation, if the Board determines that a proposal solicitation process is needed, the Board would begin a process that would result in a new appointment of an EEU. The proposal solicitation process could be a simple competitive solicitation (like the current contract re-bid process), or a staged process that would begin with a request for expressions of interest or request for qualifications. The Board could defer the implementation of a competitive solicitation if it finds, after response to a request for qualifications or request for proposals and notice and opportunity for comment, and through application of established criteria, that alternative entities are not capable of providing performance likely to result in greater net benefits to ratepayers than the current appointee could provide, and it is not worth the cost of going to the market at that particular time. Exh. DPS-2 at 22, 24.

50. The Board would provide any EEUs, the DPS, Vermont electric utilities, and other stakeholders, an opportunity to submit comments and participate in a technical workshop regarding any competitive solicitation. Exh. DPS-2 at 24.

51. If, at the conclusion of the OPA, the Board determines that a proposal solicitation process is not needed, the Board would issue a new Order of Appointment. The new Order of Appointment would supersede all years remaining on the previous Order of Appointment. Exh. DPS-2 at 22-23.

52. An OPA should be conducted at least every 6 years to assure that there is a systematic performance review at a reasonable, specified, time interval. Hamilton pf. at 16.

53. At any time, any entity should be able to request that the Board initiate an OPA, for good cause. Any such request should state the reason for the request. The Board would review any such requests and determine whether to initiate a review process. Aldrich pf. reb. at 4; exh. DPS-2 at 24.

Discussion

An Order of Appointment would need to provide for an appropriate level of review of an EEU's performance. The 2009 Draft Recommendation incorporates several types of performance reviews, including:

- Establishment and review of specified performance indicators and applicable minimum requirements (performed at least every three years);
- Annual certification by the DPS regarding whether an EEU has achieved or made appropriate interim progress toward achieving the established performance indicators, whether an EEU is satisfactorily executing its responsibilities that are not directly measured by performance indicators, and whether an EEU's performance relative to performance indicators is consistent with the portion of the three-year budget that has been expended;
- Overall Performance Assessment ("OPA") of an EEU's performance (performed at least every six years);
- Independent third-party audit of the reported energy and capacity savings and cost-effectiveness of EEU services (performed every three years);
- Ongoing opportunity to consider appointment if performance is poor; and
- Ongoing monitoring, savings verification and evaluation by DPS.

There is no dispute regarding the value of these performance reviews.⁹⁹ We conclude that they are all in the public interest and should be provided for in an Order of Appointment.

However, there is a dispute regarding the frequency of certain performance reviews. IBM asserts that an OPA should be conducted every three years, instead of at least every six years. In addition, the DPS and GMP propose an additional performance review, referred to as a Preliminary Performance Review ("PPR") that would occur following every three-year

99. We note, however, that AIV argues that "as strong a presumption for competitive solicitation of bids as is reasonable" should be built into the underlying EEU structure. According to AIV, this would avoid complacency on the part of the appointee or regulators, as well as to help avoid any possible perception that any relationship between a given appointee and regulators or other authorities might influence a decision not to solicit bids for a reappointment or new contract. Driscoll pf. at 5-6.

These statements could be construed to be critical of the OPA, although AIV does not mention that proposed performance review by name. If they were intended to be critical of the OPA, we do not find them persuasive. As we concluded in Section VA, above, because of the incumbent advantages possessed by VEIC, as long as VEIC continues to achieve exemplary performance, it is unlikely that firms will attempt to compete against the incumbent. In this situation, when a competitive solicitation has only a slight prospect of soliciting competitive bids, there is little value to automatically conducting the solicitation.

appointment period when an OPA is not required, and would be conducted in order to determine if there is sufficient reason to defer an OPA for three years. Thus, the fundamental issue raised by all three parties is whether there should be some type of formal performance review every three years that is linked to the possibility of performing a competitive solicitation, if the review supports such a conclusion.

The DPS asserts that such a review is likely to increase confidence and contribute to a public perception that the incumbent EEU is performing well.¹⁰⁰

IBM argues that any review process that exceeds a three-year cycle would provide the potential for too many years of poor performance between OPAs,¹⁰¹ while the DPS asserts that the opportunity for review on a three-year basis is "critical" to ensure effective regulation that can act as a proxy for the incentives that flow from being in a competitive marketplace.¹⁰² IBM further contends that an OPA should be a learning tool issued to improve the process and continuously improve and foster stronger communication between the EEU, the DPS, and the Board. IBM also argues that a three-year review process is consistent with Vermont law, which requires an independent audit and the adjustment of performance targets every three years.

These arguments do not convince us that there must be a scheduled formal performance review every three years that is linked to the possibility of performing a competitive solicitation, if the review supports such a course of action. The primary reason we are not persuaded is our earlier determination that an Order of Appointment should provide for an ongoing opportunity to reconsider the appointment if an EEU's performance is poor. All three Draft Recommendations provide that at any point in an appointment cycle, the DPS or any other entity may request that the Board initiate an OPA for good cause (which must be stated in the request). The Board would review any such requests, including the supporting information provided with the requests, and determine whether sufficient cause exists to warrant initiating an OPA. This ability to request an OPA at any time for good cause effectively addresses IBM's concern that there

100. DPS Brief at 21.

101. IBM Brief at 12.

102. Poor pf. at 16.

could be too many years of poor performance between OPAs, as well as the DPS's concern about appropriate opportunities for performance review.¹⁰³

In addition, other types of performance reviews will be conducted every three years so there will be formal, scheduled opportunities to review an EEU's performance, and the public will have ample opportunity to understand whether an incumbent EEU is performing well. For example, the independent third-party audit of the reported energy and capacity savings and cost-effectiveness of EEU services is required by statute to be performed every three years.¹⁰⁴ In addition, Vermont law requires "[t]he linkage between compensation and verified savings in energy usage and demand (and other performance targets)" to be reviewed and adjusted at least every three years.¹⁰⁵ Furthermore, as discussed further in Section VIII B3, below, the DPS will continue to conduct its EEU evaluation activities on a three-year cycle. These reviews will help the DPS and other parties identify any performance concerns that would prompt them to request that the Board initiate an OPA mid-cycle.

Nevertheless, we are persuaded that an additional performance review would help ensure that an EEU's performance is satisfactory. This performance review would include consideration of the relative benchmarks of entities conducting similar efficiency resource acquisition efforts in other jurisdictions, using appropriate indicators of relative performance.¹⁰⁶ Our experience setting performance indicators under the current contract model has convinced us that the results of such a Benchmarking Review would be useful when setting performance indicators. Therefore, we determine that an Order of Appointment model should also include a Benchmarking Review conducted by the DPS that would compare an EEU's performance to other energy efficiency providers' performance, normalizing for program maturity, funding, demographics, and other important variables. The Benchmarking Review would be similar to the DPS's proposed PPR, except that it would not be automatically linked to the possible performance of an OPA. The DPS estimates that such a Benchmarking Review would take four

103. Hamilton pf. at 18-19.

104. 30 V.S.A. § 209(e)(12).

105. 30 V.S.A. § 209(e)(2).

106. Exh. DPS-WP-2 at 3.

to six months to complete. We determine that it should be conducted in time to inform the process used to set performance goals.

Attachment A to this Order presents the approximate timeline for the performance reviews we determine should be contained in an Order of Appointment, including some reviews currently conducted by the Board and the DPS that we determine should also be performed under an Order of Appointment structure. This timeline also shows the relationship of the various performance reviews to each other. For example, Benchmarking Reviews must be performed before the process for establishing performance goals. Similarly, OPAs should be performed after the performance-incentive determination is made for the second three-year performance period; this will allow an OPA to consider an EEU's performance during two performance periods.

The performance reviews shown on Attachment A are critical to maintaining effective oversight of an EEU. Vermont law requires the Board to provide for the independent evaluation of programs delivered by an EEU, as well as to require an EEU to deliver Board-approved programs in an effective, efficient, timely and competent manner.¹⁰⁷ The performance reviews shown on Attachment A will enable us to fulfill these responsibilities. Therefore, while we expect the DPS to conduct some of the reviews and play a key role in others, we expressly note that if the reviews are not completed according to the attached timeline, the Board may conduct such reviews itself.

One important point to note is that performing an OPA at the time shown on Attachment A (approximately during the second half of year 7 of a 12-year appointment) means that, if warranted, the current appointment would be extended at the beginning of year 8. However, it is important to keep appointment terms synchronized with the three-year performance periods so that, if a change in provider is warranted, it can be appropriately timed. In order to achieve this synchronization, it will be necessary for appointment extensions to be for 11 years, or an additional six years beyond the remaining five years in the current appointment. In such a circumstance, the next OPA would be performed approximately during the second half of year 6 of the 11-year extension, unless the Board initiated an OPA earlier for good cause.

107. 30 V.S.A. §§ 209(e)(10) and (11).

D. Initial Order of Appointment

Findings

54. An OPA should be conducted prior to the award of an initial Order of Appointment (this OPA is referred to herein as an "Initial OPA"). Poor pf. at 18; Aldrich pf. at 15.

55. An Initial OPA will allow for an initial performance evaluation of the incumbent EEU provider and an assessment of current market conditions and alternative service providers. Aldrich pf. at 15.

56. An Initial OPA would allow the Board to assess the current level of performance and service quality at the commencement of this significant shift in EEU structure. Such a review is analogous to the review of costs conducted at the outset of a traditional utility's alternative regulation plan to ensure that rates are appropriately set. This level of accountability is a fair exchange for ratepayers given the heightened level of stability being potentially afforded to the incumbent. Poor pf. at 18.

57. Under existing review mechanisms, there has been no assessment of how the performance of the entities serving as the EEU relates to that of similar entities in other jurisdictions, or whether programs, ideas or innovations in other jurisdictions are being adequately evaluated to determine if they could be implemented in Vermont. An Initial OPA will provide this assessment, and as a consequence of being conducted publicly, will afford all interested parties an opportunity to participate in the process. Poor pf. reb. at 8-9.

58. An Initial OPA will allow the State to benchmark performance versus other states and create a baseline to which future assessments can be compared. Poor pf. at 19.

Discussion

The most significant transition issues associated with a change to an Order of Appointment structure are: (1) what process should be used to issue the first Order of Appointment; and (2) when should the first appointment term begin.

AIV argues that there should be a proactive review of efficiency programs and policies in other jurisdictions and a full competitive bidding process for initial appointments.¹⁰⁸ The DPS and IBM assert that there should be an Initial OPA.¹⁰⁹ BED, CLF, CVPS, GMP, VEIC, and WEC contend that the current EEU providers should be appointed without any formal consideration of alternative providers.¹¹⁰ CVPS argues that Vermont has made substantial investments to build VEIC's and BED's capabilities as EEUs that would be stranded if they are not transitioned to the new structure.¹¹¹

VEIC asserts that the first appointment period should start January 1, 2010.¹¹² CVPS contends that ratepayers would benefit from "swiftly transitioning" to the new Order of Appointment structure.¹¹³ The DPS argues that the appointment term should begin as soon as possible after an Initial OPA.¹¹⁴

We acknowledge that both VEIC and BED have performed well during the nine years they have served as EEUs.¹¹⁵ VEIC has met or exceeded 35 out of its 40 performance indicators in the time it has served as Efficiency Vermont.¹¹⁶ In addition, in 2008, the Board chose to extend VEIC's contract for an additional three years instead of issuing a competitive solicitation.¹¹⁷ Furthermore, the Board has been kept well-informed about the progress of the EEUs through ongoing reporting by BED and Efficiency Vermont, the annual public plan review process, and the ongoing monitoring and verification function overseen by the DPS.¹¹⁸

Nevertheless, we disagree with CVPS's assertion that the benefits to customers and the electric system that are expected to arise under an Order of Appointment structure are likely to outweigh the potential benefits that could be garnered through a "costly and lengthy selection

108. Driscoll pf. at 8.

109. Aldrich pf. at 15-16; Poor pf. at 18.

110. Buckley pf. at 7; Steinhurst pf. reb. at 9; Bentley pf. at 4, 19-20; Martin pf. at 4-5; Plunkett pf. reb. at 9; letter from William Powell, WEC, to Susan Hudson, Clerk, Board, dated 6/23/09.

111. Bentley pf. at 19.

112. Exh. VEIC-BH-4 at 27.

113. Bentley pf. at 19.

114. DPS Reply Brief at 2.

115. Steinhurst pf. at 12.

116. Hamilton pf. at 30.

117. Hamilton pf. at 31.

118. Buckley pf. at 7.

process."¹¹⁹ Instead, we are persuaded that there should be an Initial OPA for the following reasons.

First, an Initial OPA will allow for an assessment of current market conditions and alternative service providers.¹²⁰ None of the regular reports received by the Board regarding the current EEUs address alternative service providers.

Second, the change to an Order of Appointment structure is analogous to the change for an electric utility from traditional cost-of-service regulation to alternative regulation. When such a change occurs for an electric utility, the Board reviews the utility's costs to ensure that rates are appropriately set.¹²¹ An assessment of an EEU's performance at the beginning of this change in structure is similarly appropriate.

Third, it is reasonable to periodically benchmark efficiency service provision in Vermont to other jurisdictions and administrative structures. In the past, this was performed when the Board reviewed proposals to serve as the EEU, which last occurred in 2005. CLF and VEIC have presented some evidence in this proceeding regarding how Vermont's energy efficiency programs compare to those provided in other jurisdictions;¹²² however, this comparative information is at a high level and more detailed comparative information would be useful. If we did not change to an alternative structure, it would be time to issue another request for proposals in 2011, only one year later than the Initial OPA would likely be performed. The alternative would involve waiting to perform an OPA until after the first six years of an EEU's appointment. This would result in no formal consideration of alternative providers for an unacceptably long period of time.

Finally, conducting an Initial OPA will indicate whether there is cause to solicit proposals from alternative energy efficiency providers who might provide greater net benefits to Vermont ratepayers relative to the current EEU providers. If an Initial OPA indicates there is such cause, we will issue a competitive solicitation. An Initial OPA and a competitive solicitation would be focused on what benefits may be provided to ratepayers in the future, not what investments

119. Bentley pf. at 19-20.

120. Aldrich pf. at 15.

121. Poor pf. at 18.

122. Steinhurst pf. at 13-14; exh. CLF-WS-1; exh. CLF-WS-2; Plunkett pf. reb. at 29-32; exh. VEIC-JJP-2.

Vermont may have already made in the current entities serving as EEU's. Thus, we conclude that, contrary to CVPS's assertion, the benefits of conducting an Initial OPA are likely to outweigh the potential benefits of a swift transition to an Order of Appointment structure.

We are not, however, persuaded by AIV's and IBM's arguments that a full competitive bidding process is automatically necessary prior to the issuance of an initial Order of Appointment. We accept AIV's contention that the standards of appointing an initial appointee should not be any less than the standards for future reappointments or new appointments.¹²³ However, since we have concluded that competitive bidding will not be required for future reappointments if an OPA indicates otherwise, our decision that an Initial OPA is sufficient is consistent with this principle.

As noted above, we expect it is likely that the Initial OPA would be performed in 2010. This is not consistent with VEIC's recommendation that the first period of appointment begin on January 1, 2010.¹²⁴ However, such a start date would not be feasible even if we did not conduct an Initial OPA because, as determined in today's Order, additional proceedings are necessary to develop an actual Order of Appointment, and it will not be possible to complete those proceedings before January 1, 2010. The transition to a new structure is significant and sufficient time should be allocated to ensure that it is as smooth as possible. Therefore, we expect it is more likely that the transition to a new structure will occur at the end of the current contract (December 31, 2011), particularly if the Initial OPA demonstrates that a competitive solicitation is warranted.¹²⁵ If the Initial OPA does not demonstrate that a competitive solicitation is warranted, it may be possible to transition to a new structure prior to the end of the current contract. However, any such consideration of a mid-contract start date must take into account whether the benefits of an earlier transition outweigh the complexities of changing the structure in the middle of a contract cycle as well as how to synchronize the appointment period with the

123. Driscoll pf. at 8.

124. Exh. VEIC-BH-4 at 27.

125. Conducting an Initial OPA in 2010 should provide sufficient time to conduct a competitive solicitation, if one is warranted, and, if a new provider is selected, provide an orderly transition at the end of the current contract (December 31, 2011). However, we recognize that an Initial OPA has never been conducted before. If it takes longer than projected and the Board finds it demonstrates that a competitive solicitation should be conducted, it may be necessary to appoint an interim provider for a short period of time. We will consider this issue if it arises.

three-year cycles of performance reviews that will continue under the new structure.

Accordingly, we direct the Hearing Officer to consider issues associated with a possible starting date for an Order of Appointment in the second phase of this Docket.

Finally, this is one area where it is important to recognize the difference between the two current EEU's — BED and VEIC. In Docket 5980, the Board's original investigation into the creation of the EEU program, the Board issued an order appointing BED to serve as an EEU within its service territory.¹²⁶ BED has served in that role continuously since that time. Thus, it would be inaccurate to characterize a new order appointing BED to serve as an EEU as an "initial" order. Nevertheless, given the overall change to the EEU's structure, it is appropriate to reconsider BED's appointment at the same time VEIC's appointment is considered. Therefore, we will require that an Initial OPA be conducted for BED as well, although in its case, the finding issued by the Board at the conclusion of the Initial OPA will address a slightly different issue. BED is currently delivering EEU services in its service territory instead of the statewide EEU provider; the alternative to this arrangement would be for the statewide provider to deliver those services, not some third entity. Therefore, at the conclusion of the Initial OPA for BED the Board will issue a finding regarding whether there is cause for the statewide provider of energy efficiency services to also deliver all EEU services in BED's service territory, not regarding whether there is cause to conduct a competitive solicitation to provide energy efficiency services in BED's service territory.

E. Termination or Revocation of the Appointment of an EEU

Findings

59. Upon appointment, an EEU should not be able to abandon or curtail any responsibilities associated with the appointment without first obtaining the approval of the Board. Exh. DPS-2 at 3.

60. The Board should be able to terminate an EEU's appointment at any time prior to its end date for good cause, in the event that an EEU materially breaches the terms of its appointment or

126. Docket 5980, Order of 9/22/00 at 18. As noted in Section VA, above, this was possible because BED was already a "company" subject to the Board's jurisdiction under Title 30. Buckley pf. at 4.

in the event bankruptcy proceedings are commenced against an appointed EEU, it is adjudged bankrupt, or a receiver is appointed. In such cases, the Board should be able to terminate the appointment by giving notice in writing to an EEU. In the event an appointment is revoked for good cause, the Board should be able to proceed in any manner it deems proper. Exh. DPS-2 at 54-55.

61. The Board should be able to terminate an appointment at any time following a Board decision that ratepayers would benefit by issuing a solicitation for entities to perform services as an EEU, or if it chooses to no longer use an EEU to perform the functions identified in 30 V.S.A. § 209(d). Any such termination should be effective no sooner than 18 months after notice from the Board to the affected EEU. Exh. DPS-2 at 3, 55.

62. An EEU should provide reasonable transition assistance to the Board and any entity designated by the Board to ensure that the functions of an EEU are continuously carried out without interruption. Exh. DPS-2 at 55.

63. An Order of Appointment should address what amounts should be paid to an EEU in the event of revocation or termination. Depending upon the reason for termination, such amounts could include: reasonable costs incurred prior to the date of termination; reasonable transition costs; costs incurred as a result of termination; or earned performance incentives. Any obligation to reimburse an EEU for these costs and performance incentives should be limited to available funds. Exh. DPS-2 at 54-56.

Discussion

All three Draft Recommendations contain similar provisions related to termination and revocation of an EEU's appointment. The sole contested issue related to termination of an EEU's appointment concerns the assignment of the EEU's remaining obligations, which is addressed in Section VF, below.

We conclude that an Order of Appointment should prohibit an EEU from abandoning or curtailing any responsibilities associated with the appointment without first obtaining the approval of the Board. As we have previously discussed, an Order of Appointment should be somewhat similar to a Certificate of Public Good allowing a company to provide utility services

in Vermont. Such Certificates of Public Good commonly require the company to obtain Board approval to abandon or curtail the provision of utility services. Since energy efficiency services are utility services, it is appropriate for an Order of Appointment to include similar requirements.

We have previously determined that the Board should be able to terminate an EEU's appointment at any time for good cause.¹²⁷ One benefit of such a provision is that it will mitigate the risk that ratepayers would be locked into an appointment with an underperforming appointee. There are, however, a variety of different types of causes that could lead the Board to terminate an EEU's appointment. Depending upon the cause, it might or might not be appropriate for the Board to provide advance notice to the EEU of the early termination. The 2009 Draft Recommendation provides that, in the event the Board elects to terminate an appointment to appoint a different implementing entity or to terminate the existence of the EEU, the Board should give 18 months advance notice to the affected EEU of the termination. We conclude this period of advance notice is reasonable. As a practical matter, if the Board determines that an EEU's performance justifies the initiation of an early OPA, it would likely be 18 months before a new entity could be in place (this assumes that an OPA requires 6 months to complete, and a competitive solicitation requires an additional year to complete). Similarly, if the Board decided to terminate the EEU program, the Board would need to ensure that some other entity (or entities) was prepared to provide energy efficiency services to Vermont ratepayers. It would be in the public interest for such a transition to occur in an orderly manner, and allowing 18 months would not be unreasonable.

However, if the appointment is revoked because an EEU has materially breached the terms of its appointment or because of bankruptcy, it may not be appropriate for the Board to provide such a period of advance notice prior to termination. The three Draft Recommendations all state that the Board should provide a to-be-determined period of advance notice in the event it revokes an appointment for good cause.¹²⁸ We direct the Hearing Officer to consider in the second phase of this proceeding whether such a period of advance notice is in the public interest, and if so, what that period of time should be.

127. *See*, Section VA, above.

128. *See*, exh. VEIC-5 at 51; exh. DPS-2 at 54-55; exh. VEIC-BH-4 at 53.

F. Assignment of Remaining Obligations if Order of Appointment Is Terminated

Findings

64. It is expected that, on the date of any termination of an Order of Appointment, an EEU will have outstanding commitments made as part of its responsibilities as an EEU, including, but not limited to, loans, loan guarantees, partnership agreements, and committed capacity in the Forward Capacity Market. Exh. DPS-2 at 57.

65. An EEU should be relieved of these outstanding commitments from the date of termination forward, but should remain responsible for: (a) all payments due up to the time of termination; and (b) all liabilities arising from any disputes arising from such contracts up to the time of termination. Exh. DPS-2 at 57.

66. The responsibility for the outstanding commitments from the date of termination forward should be assigned by the Board to the new entity serving as the EEU, if there is one. Bentley pf. sur. at 9; exh. DPS-2 at 57.

67. If there is no successor EEU, the Board should determine the responsibility for these obligations at that time. Poor pf. reb. at 12.

Discussion

Many energy efficiency projects and initiatives take multiple years to complete. One example of such a project is a large commercial new construction project. Under the existing structure, the Board expects the EEU to continually work on such projects, even if the project is not expected to be complete until after the end of the EEU's current short-term contract. As a result, since the EEU's inception, the Board has expected that the EEU will have outstanding commitments on the date its contract ends or is terminated. This would not change under an Order of Appointment structure; if the appointment is terminated, the Board would expect the EEU to have outstanding commitments as of the date of termination.

The 2009 Draft Recommendation provides that an EEU would be relieved of those outstanding commitments from the date of termination forward, and that the responsibility for

those outstanding commitments would be "assigned by the *Board* to the new entity serving as an *EEU*, or the [distribution utilities] if appropriate should there be no successor *EEU*."¹²⁹

CVPS and GMEU disagree with this aspect of the 2009 Draft Recommendation. They argue that the obligations or commitments of an EEU should not be assigned to any distribution utility in the event of termination of an EEU's appointment. They assert that when an EEU enters into obligations, it will likely do so without the prior consent of the Vermont utilities, and because the utilities will have had no opportunity to participate in the decision to incur the obligations, it would be unfair to assign the obligations to them. CVPS and GMEU contend that while this situation could be addressed by asking the utilities to participate in an EEU's decision-making, this would only increase the administrative cost and burden of an EEU and the distribution utilities. In addition, CVPS asserts that it currently does not have the capability to take over the functions of the EEU, and it does not suspect that many other utilities have such capabilities either. Therefore, according to CVPS, if it were assigned responsibility to replace the EEU on an interim basis, CVPS would have to temporarily outsource this function. As a result, the appointment of an interim statewide EEU and assignment of outstanding obligations to such an entity would likely be a better solution.¹³⁰

The DPS asserts that the Board should retain the flexibility in the event an EEU appointment is terminated to assign outstanding responsibilities and commitments of an EEU as it deems in the best interest of ratepayers. The DPS argues that in certain situations, such as when there is no successor EEU, the distribution utilities are the most logical entities to fulfill such duties.

The issue of what would happen to an EEU's outstanding commitments if an appointment was terminated is not unique to an Order of Appointment structure. The same issue would arise under the current contract model at the end of a contract or if a contract was terminated. We are persuaded that a successor EEU, which presumably would be experienced in delivering energy efficiency services and would have the capability to immediately begin doing so, would be the

129. Exh. DPS-2 at 57 (*italics in original*).

130. Bentley *pf. sur.* at 9 n.1; CVPS Brief at 16 n.2; letter of October 9, 2009, from David John Mullett, Vermont Public Power Supply Authority on behalf of GMEU, joining CVPS Brief.

entity best suited to fulfill the obligations incurred by the previous EEU. Therefore, we conclude that it would be in the best interest of ratepayers for an EEU's outstanding commitments to be assigned to the successor EEU, if there is one.

However, we are not able to determine at this time who should be assigned an EEU's outstanding commitments if there is no successor EEU. The termination of the EEU program could occur for a variety of reasons, one of which could be a change in Vermont law. In such a situation, the Board may not have discretion regarding how an EEU's outstanding commitments are assigned. Assuming the Board did have discretion, it would be important for the Board to consider the specific situation at that time, including the distribution utilities' capabilities, before determining who should be assigned an EEU's outstanding commitments. Therefore, we decline to adopt CVPS and GMEU's recommendation that we determine now that the distribution utilities will not be assigned any outstanding EEU obligations if an appointment is terminated and there is no successor EEU.

CVPS has also recommended that the Board state that it will make available funds from the Energy Efficiency Utility Fund ("EEU Fund") to retire the costs for such obligations.¹³¹ This approach is reasonable; the funds in the EEU Fund were collected to pay for such obligations, and it is appropriate for the funds to be used for their intended purpose, regardless of who delivers the energy efficiency services. However, as noted above, the termination of the EEU program could occur for a variety of reasons, one of which could be a change in Vermont law. It is possible that such a change would affect the use of any remaining balances in the EEU Fund. Therefore, we express today our intention that, to the extent possible, funds from the EEU Fund would be available to whoever was assigned an EEU's outstanding commitments to pay for the reasonable costs of fulfilling those obligations.

VI. EEU RESPONSIBILITIES

The 2009 Draft Recommendation outlines the scope of the EEU's responsibilities. Under the current contract structure, the EEU is performing many of these functions. The transition to an Order of Appointment may allow the EEU to expand some of the roles described below.

131. Bentley pf. sur. at 9.

Several parties provided testimony in this proceeding on certain responsibilities contemplated in the 2009 Draft Recommendation. As described below, some of these responsibilities will require further development before the terms of an Order of Appointment are finalized.

A. EEU Responsibilities to be Included in an Order of Appointment

These responsibilities were not contested by any party and will be included in an Order of Appointment.

Findings

68. *General:* The EEU should be responsible for acquiring the full amount of reasonably available, cost-effective demand-side resources through comprehensive approaches to reducing customer electricity requirements. Exh. DPS-2 at 4.

69. *Market Transformation:* The EEU should balance the pursuit of short-term resource acquisition with long-term resource acquisition that may be achieved through market transformation strategies. Exh. DPS-2 at 4.

70. *Demand-Side Resource Acquisition:* The EEU should plan and implement demand-side resource acquisition activities both at the system-wide level and sub-levels. Exh. DPS-2 at 4.

71. *Implementation Strategies and Incentives to Customers:* The EEU should design and implement initiatives and strategies that are comprehensive and innovative to maximize the acquisition of net benefits for all retail electric customers. Exh. DPS-2 at 4-5.

72. *Distributional Equity:* Over time, the system-wide benefits should generally reflect the level of contribution to EEU costs by ratepayers as reflected in EEC payments by customer class and geographic region, excluding geographically targeted programs. Exh. DPS-2 at 5.

73. *DPS Forecasts and Plans:* The EEU should make information available to assist with the Department's energy planning responsibilities. Exh. DPS-2 at 8.

74. *Forward Capacity Market:* The EEU should participate in the ISO-NE Forward Capacity Market to secure capacity payments for the benefit of the state. Exh. DPS-2 at 8.

75. *Act 250 Compliance Assistance*: The EEU should provide compliance assistance regarding energy requirements of Act 250 to applicants to the extent that the EEU deems such assistance will support the EEU's demand-side resource acquisition goals. Exh. DPS-2 at 8.

76. *Codes and Standards*: The EEU should provide technical support and training on energy codes and standards including direct technical assistance, workshops, and professional training. Exh. DPS-2 at 8.

77. *Applied Research, Development, and Demonstration*: The EEU should be permitted to conduct a reasonable level of applied research, development, and demonstration that is likely to be cost-effective in meeting long-term goals. Statements of objectives, estimated costs, and estimated savings must be approved by the Board after an opportunity for comment from stakeholders. Exh. DPS-2 at 10.

78. *Marketing*: The EEU should implement marketing to (1) promote customer participation in EEU services and initiatives, (2) increase consumer demand for energy-saving products and services, and (3) affect consumer decision-making in consumer-driven energy efficiency choices. Exh. DPS-2 at 10-11.

79. *Training and Workforce Development*: The EEU should be permitted to develop and implement energy education and technical training initiatives, consistent with long-term goals and objectives, including cooperative activities with Vermont education institutions, vocational training, and continuing educations. Exh. DPS-2 at 11.

80. *Energy Education in Schools and Colleges*: The EEU should be authorized to develop or support energy education initiatives in Vermont schools, colleges, and universities. Exh. DPS-2 at 11.

81. *Information for Distributed Utility Planning ("DUP")*: The EEU should make customer-specific data available to the distribution utility serving the relevant customer, subject to appropriate confidentiality protections. Exh. DPS-2 at 11-12.

82. *Review of Other Energy Efficiency Programs*: The EEU should be allowed to review projects under the Customer Credit Program, Energy Savings Account Programs, the Self-

Managed Energy Efficiency Program, or any other self-administered energy efficiency programs, for cost-effectiveness under the societal test.¹³² Exh. DPS-2 at 12.

83. *Information Systems*: The EEU should develop, maintain, and monitor management and operational systems for its needs. Bentley pf. at 5.

84. *Technical Reference Manual*: The EEU should collaborate with the DPS and stakeholders to expand and update the EEU Technical Reference Manual ("TRM") as appropriate.¹³³ All changes should be documented in the TRM, including the basis for the new assumption. At least annually the EEU should provide copies of the TRM to the Board, DPS, and the utilities. The EEU should provide on an ongoing basis any substantive changes in the TRM to the Board, DPS, and the utilities. Bentley pf. at 10-11.

85. *Cost-effectiveness Screening Tools*: The EEU should utilize the Societal Test as described by the Board in its April 16, 1990 Order in Docket No. 5270 and its progeny. The EEU should use appropriate statewide and area-specific cost-effectiveness screening tools developed in consultation with stakeholders in its planning and implementation activities. The EEU should incorporate externality values provided by the Board and should also incorporate any new avoided costs and externality adjustments approved by the Board in its screening tools. Bentley pf. at 10.

86. *Sharing Customer-Specific Data*: The EEU should make available customer-specific data, including but not necessarily limited to information regarding customer implementations, to the distribution utility serving the relevant customer, if requested by the distribution utility and subject to appropriate confidentiality protections against disclosure to unauthorized entities or personnel. Bentley pf. at 9.

87. *Tracking Performance*: The EEU should conduct the implementation tracking, savings measurement activities, and process evaluations that are appropriate and useful for evaluating its

132. The Board is currently reviewing the Energy Savings Account Programs and the Self-Managed Energy Efficiency Program proposed by the Department under separate processes outside this docket.

133. The TRM is a regularly-updated, comprehensive list of all measure and program assumptions used in determining energy efficiency measure and program cost-effectiveness.

performance against its established performance indicators.¹³⁴ The EEU should submit documentation to support its claims of performance. Bentley pf. at 5-6.

Discussion

We determine that an Order of Appointment should include the responsibilities outlined in Findings 68 through 87, above. These responsibilities were not challenged by any party. In the second phase of this proceeding, these responsibilities may be further refined.

(1) Heating and Process-fuel Efficiency

Findings

88. The EEU should offer services and initiatives to comprehensively address all cost-effective energy efficiency opportunities associated with heating and process fuels. The magnitude of such services would be determined by the amount of financial resources available for this purpose. Exh. DPS-2 at 9-10.

89. As part of its responsibilities, the EEU should, to the extent possible with available resources, make continuous and proportional progress toward attaining the overall state building efficiency goals established by 10 V.S.A. § 581, by promoting all forms of energy end-use efficiency and comprehensive sustainable building design. Hamilton pf. at 37.

Discussion

Pursuant to 30 V.S.A. § 209(d)(7), the EEU is required to use the net revenues from its participation in the ISO-NE Forward Capacity Market "to deliver fossil fuel energy efficiency services to Vermont heating and process-fuel consumers on a whole-buildings basis to help meet the state's building efficiency goals established by 10 V.S.A. § 581." Pursuant to 30 V.S.A. § 209(d)(8), effective January 1, 2010, revenues from Vermont's participation in the Regional Greenhouse Gas Initiative are required to be deposited into the EEU Fund. These funds are also required to be used to help meet the State's building efficiency goals. The Board's 2009-2011 contract with VEIC requires the EEU to provide efficiency services with greater

134. See Section VIIC for a further description of performance indicators.

comprehensiveness in the treatment of buildings from an all-fuels perspective.¹³⁵ The level of these non-electric services and financial incentives is limited by the amount of available funds, as specified by statute.

VEIC provided testimony in support of the EEU assuming a role in heating and process-fuel efficiency services as specified in statute.¹³⁶ The Department also supports provisions that would require the EEU to provide heating and process-fuel efficiency services as required by the Board or the Legislature.¹³⁷ GMP believes that the Board should ensure that the EEU's role in relation to these services conforms to the legislation.¹³⁸

There is no substantive disagreement on this issue and the parties' testimony reflects new legislative direction. Accordingly, an Order of Appointment should require that the EEU fulfill the role assigned to it by the Legislature to deliver heating and process-fuel efficiency services. This role is subject to and limited by the available funds designated to deliver such services.

(2) Vermont System Planning Committee ("VSPC") Participation

Findings

90. The EEU should be a participant in the VSPC including attending meetings and assisting in fulfilling subcommittee charters. Exh. DPS-2 at 7.

91. The EEU is expected to coordinate major planning assumptions in all forecasting efforts with the Department, VELCO, and the distribution utilities. These estimates should be presented in a manner suitable for use in connection with the performance of Integrated Resource Planning ("IRP"). Exh. DPS-2 at 7.

135. Hamilton pf. at 35.

136. Hamilton pf. at 37.

137. Poor pf. at 22.

138. Martin pf. at 14.

Discussion

The VSPC and its associated planning process was created in Docket 7081¹³⁹ to facilitate consideration of cost-effective non-transmission alternatives to new transmission projects. The VSPC provides for increased collaboration among utilities and transparency of the planning process. VELCO asserts that the EEU should have a clear and significant role in the VSPC and in integrated resource planning to help ensure effective coordination and input on non-transmission alternatives related to energy efficiency activities.¹⁴⁰

We recognize the value of the EEU's participation in the VSPC and in IRP to ensure effective coordination. We are persuaded that it is important for the EEU to provide support in the forecasting efforts undertaken by the Department, VELCO, and the distribution utilities as described in the 2009 Draft Recommendation.¹⁴¹ Accordingly, we direct that an Order of Appointment include this as a responsibility of the EEU.

B. EEU Responsibilities to be Addressed Further in this Proceeding

These responsibilities require further consideration in the second phase of this proceeding.

(1) Distributed Utility Planning ("DUP") and Transmission Planning

Findings

92. The EEU should provide support for utility DUP and transmission planning processes. The EEU should both develop or arrange for planning and enhanced implementation capabilities. Exh. DPS-2 at 5.

93. The EEU should develop, consistent with Board direction, appropriate geographically-targeted services, initiatives, and other activities to capture cost-effective incremental demand-side resources. Exh. DPS-2 at 7.

139. Docket 7081 was the Board's investigation into least-cost integrated resource planning for Vermont Electric Power Company, Inc.'s transmission system.

140. Frankel pf. at 2-3.

141. Exh. DPS-2 at 6-8.

94. System-wide energy efficiency services are funded via the EEC but DUP remains the responsibility of the distribution utilities under the Orders issued by the Board in Dockets 5980 and 6290. Bentley pf. at 14.

95. The Board has devoted revenues collected via the EEC to fund both system-wide and geographically targeted energy efficiency services by the EEU. Bentley pf. at 14.

96. It is premature to fully remove the obligation of utilities to fund energy efficiency programs in their own service territories. Poor reb. at 11.

97. The EEU should continue to coordinate with distribution utilities on implementation activities in the respective service territories. Poor reb. at 11.

Discussion

On September 25, 2006, the Board issued an Order determining that a portion of the EEU's 2006-2008 budget would be spent on targeting energy efficiency services in specific geographic areas to help reduce the need to upgrade transmission and distribution infrastructure. On August 29, 2008, the Board issued an Order establishing the EEU budgets for the 2009-2011 time period and specified that \$12.2 million of each year's budget would be directed towards geographically targeted programs. In this proceeding, three parties offered recommendations on the geographically targeted programs offered by the EEU.

GMP continues to support the EEU's delivery of geographically-targeted programs because energy saved and capacity avoided in certain areas of Vermont may result in greater savings than in other areas of the state.¹⁴²

CVPS recommends that the activities of an EEU should be in place of utility-specific programs developed pursuant to 30 V.S.A. § 218c and should be deemed by the Board to satisfy the obligations of the distribution utilities under sections 218c(a)(2) and (b).¹⁴³ CVPS believes that it is appropriate to assign full responsibility to the EEU to plan for and deliver all demand-side resource acquisition activities. CVPS asserts that the distribution utilities should not be

142. Martin pf at 6.

143. CVPS Initial Brief at 6.

responsible for conservation and efficiency program planning because it is a duplication of the functions provided by the EEU.¹⁴⁴

It would be premature for the Board to issue an order now that would remove all responsibilities of the distribution utilities to offer demand-side management programs to customers in their service territories on the basis that an appointed EEU should implement these programs. Geographically targeted programs are a relatively new initiative, and the processes and impacts of these programs have not yet been evaluated. The parties in this proceeding did not present any information to warrant deviation from the responsibilities outlined in the Board's Order of November 4, 2008, approving the EEU's geographically-targeted activities for 2009-2011. Furthermore, the implementation of geographically targeted programs in a utility's service territory does not obviate the utility's individual responsibility under 30 V.S.A. § 218(c) to prepare and implement a least-cost integrated resource plan.¹⁴⁵ As such, the EEU will continue to coordinate with distribution utilities on implementation activities in their respective service territories.¹⁴⁶

However, an Order of Appointment should clarify the EEU's role with respect to geographically targeted programs. We direct the Department to file its evaluation results on these programs in this Docket when they are complete so that the Hearing Officer can discuss the results with interested stakeholders and explore the roles of the EEU and distribution utilities in geographically targeted areas.¹⁴⁷ The Board will consider the arguments raised by CVPS in this phase of this proceeding regarding this issue at that time.

144. Bentley pf. sur. at 5.

145. Order of 1/7/08 re Geographic Targeting of Energy Efficiency Utility Funds at 5.

146. CVPS and GMP have both indicated that they are taking steps to supplement the geographically targeted programs in their respective service territories to increase the likelihood of deferring or negating the need for transmission and distribution upgrades in the targeted areas. Order of 11/4/08 re Geographic Targeting of Energy Efficiency Utility Funds in 2009-2011 at 10.

147. The Department expected to have verified data and evaluation results available in 2009 for the four geographically targeted areas first approved by the Board. Order of 11/4/08 re Geographic Targeting of Energy Efficiency Utility Funds in 2009-2011 at 7. If the DPS does not meet this goal, the Board retains the authority to conduct its own evaluations of geographically targeted programs.

(2) Combined-Heat-and-Power Measures

Findings

98. The EEU should be authorized, as part of comprehensive treatment of customers, to include certain cost-effective Combined-Heat-and-Power ("CHP") systems as an eligible demand-side resource option. Exh. DPS-2 at 8-9.

99. The EEU should be permitted to provide assistance on cost-effective projects that involve customer-sited generation in the form of CHP subject to technical and economic performance criteria described in Attachment A of the 2009 Draft Recommendation. Exh. DPS-2 at 63.

100. It is appropriate for the EEU to have more involvement in CHP projects than it does currently, subject to the limitations set forth in Attachment A of the 2009 Draft Recommendation. Martin pf. at 8.

101. Additional stakeholder coordination is needed, including coordination with the Sustainably Priced Energy Enterprise Development ("SPEED") Facilitator, before specific terms and conditions are applied to the EEU's CHP activities. Bentley pf. at 15.

Discussion

The EEU Structure Working Group discussed whether it would be appropriate for the EEU to assist customers with on-site generation projects and more specifically, CHP projects. As a result of that process, guidelines were developed to describe the EEU's potential involvement in these generation-related activities. However, the EEU Structure Working Group did not reach a consensus on the incentive amount that the EEU could offer for a single project or on the cumulative value of incentives for a year.¹⁴⁸ The guidelines also describe the costs and benefits that the EEU would consider in the project-specific cost-benefit analysis. When performing this analysis, one criteria would allow for a 10% risk adjustment which would increase a project's benefits.

148. Martin pf. at 8.

CVPS and GMP provided testimony on the EEU's involvement in CHP projects. CVPS does not object to authorizing the EEU to have a limited role in CHP activities.¹⁴⁹ GMP believes that it is appropriate for the EEU to have more involvement in CHP projects than it does today.¹⁵⁰ GMP states that it may not be appropriate to include the 10% risk adjustment in the cost-effectiveness screening of CHP projects because "the relative uncertainty of fuel expenses, and the technical complexity associated with implementing CHP, tend to offset the qualities that the risk adjustment is designed to reflect."¹⁵¹ Both CVPS and GMP believe that these activities should be subject to the types of limitations identified in the 2009 Draft Recommendation.¹⁵²

We are persuaded that an Order of Appointment should permit the EEU to expand its role in CHP projects around the state subject to guidelines which will be modeled after those in the 2009 Draft Recommendation. However, before issuing such an Order of Appointment, the guidelines must be refined, including placing limits on incentive values by project and by year, and evaluating the considerations of the cost-benefit analysis, as set forth in Attachment A of the Draft Recommendation. We direct the Hearing Officer to conduct further proceedings regarding this issue in the second phase of this Docket. We anticipate that GMP's concern regarding the risk adjustment will be addressed during that process.

(3) Demand Response

Findings

102. The EEU should be authorized, as part of comprehensive treatment of customers, to include demand response as an eligible demand-side resource option. Exh. DPS-2 at 10.

103. As Vermont pursues smart grid technologies and implements smart metering, the EEU should be authorized to work with the distribution utilities to provide services that enable customers to better manage their energy utilization with existing and new rate designs and related demand response initiatives. Bentley pf. at 16.

149. Bentley pf. at 15.

150. Martin pf. at 8.

151. Martin pf. at 8.

152. Martin pf. at 8; Bentley pf. at 15.

104. It is appropriate for the EEU to be called upon to provide information to the distribution utilities and to work with them to assess the potential of various measures as a part of forecasting and planning. Distribution utilities should continue to be responsible for the actual design of rates (including load management rates and demand response programs). Bentley pf. at 16.

Discussion

CVPS has presented testimony seeking to clarify the EEU's role in load management rate design and demand response programs. CVPS asserts that the distribution utilities should continue to be responsible for selecting the mix of resources to be deployed to serve load and resolve supply and delivery problems.¹⁵³ CVPS believes that the distribution utilities should also continue to be responsible for the actual design of rates (including load management rates and demand response programs) and should utilize the EEU's planning expertise in these efforts. Although GMP supports using the EEU as a resource in planning efforts, it believes that the distribution utilities should be permitted to independently complete load management analyses and to use a third-party consultant instead of the EEU.¹⁵⁴ No other party provided testimony on the EEU's role in load management activities.

We are persuaded that the distribution utilities should continue to be responsible for load management analysis, including any rate design activities. We conclude that an Order of Appointment should allow the EEU to offer demand response options to its customers, subject to guidelines to be jointly developed with the distribution utilities and the Department that will specify eligible demand response applications and economic screening procedures. These guidelines should clarify that the EEU will provide demand-response implementation services only on the customer side of the meter and will refer the customer to potential demand response providers, including, but not limited to, the distribution utility. Proposed guidelines should be filed in the second phase of this proceeding so they may be finalized prior to the issuance of an Order of Appointment.

153. Bentley pf. at 13.

154. Martin pf. at 7.

(4) Electro-technologies

Findings

105. Some consumer end uses can be served by both electro-technologies and other technologies. Bentley pf. at 15.

106. For example, heating and cooling services can be provided with heat pump technology using electricity rather than fuel oil or propane. Tr. 9/16/09 at 120 (Bentley).

Discussion

CVPS has recommended that the EEU be expressly authorized to consider both electro- and non-electro technologies when assessing the cost-effectiveness of consumer end-uses.¹⁵⁵ CVPS asserts some electro-technologies serve consumer end uses at a societal life-cycle cost that is expected to be less than serving the end use with other technologies. CVPS argues that "[r]eliance on these 'efficient' electrical uses would help to reduce overall societal cost."¹⁵⁶

In its testimony, the Department addressed CVPS's recommendation on electro-technologies. No other party provided testimony on this recommendation. The Department proposes that a working group be convened to explore whether the EEU should offer services and initiatives that consider both electro- and non-electro technologies when assessing the cost-effectiveness of consumer end-uses.¹⁵⁷

We are persuaded that CVPS's recommendation need not be addressed at this time. However, an Order of Appointment should clarify this issue. Therefore, we direct the Hearing Officer to conduct proceedings in the second phase of this Docket to explore the benefits of the EEU offering services and initiatives that consider both electro- and non-electro technologies when assessing the cost-effectiveness of consumer end uses.

155. Bentley pf. at 15.

156. Bentley pf. at 15.

157. Poor pf. reb. at 11.

(5) EEU Long-Term Demand Resources Plan ("DRP")

Findings

107. The Long-Term DRP should be a set of year-by-year values for the EEU's demand-side electricity resource acquisition savings goals and the associated budgets by calendar year for the twenty-year period following Board adoption of the DRP. Exh. DPS-2 at 17.

108. The Long-Term DRP, as contemplated in the Draft Recommendation, should provide short-term (e.g., three years) savings goals and budgets that can serve as the basis for performance indicators to assess the EEU's performance. It should also provide operating assumptions for long-term (e.g., 20 years) budgets and savings goals that can be used for long-term electricity resource planning by the EEU, the Department, distribution utilities, and VELCO. Exh. DPS-2 at 16.

109. The Long-Term DRP could be used to fulfill the EEU's long-range planning and forecasting responsibilities. This approach would also support greater use of longer-term (market transformation) strategies and provide a long-term planning horizon consistent with that of energy supply utilities. Hamilton pf. at 23.

110. The process for developing the DRP should normally be timed to conclude one year in advance of when it would become effective. Exh. DPS-2 at 17.

111. The EEU, the DPS, Vermont utilities, and other stakeholders should have an opportunity to submit comments and participate in a technical workshop prior to the Board adopting a DRP. Exh. DPS-2 at 18.

112. The Board should seek input from interested stakeholders to clarify the objectives of, and to determine the appropriate level of detail to include in, an EEU's DRP. Martin pf. at 11-12.

Discussion

GMP has recommended that the Board should seek input from stakeholders to further refine the concept of the DRP and to determine a suitable level of detail. For example, the annual goals identified in the DRP could represent the best estimate of future energy expenditures and savings, "stretch" goals resulting in relatively favorable outcomes, or

benchmarked goals on which to measure future EEU performance.¹⁵⁸ No other party provided a recommendation specifically related to the DRP.

We determine that it is appropriate to solicit input from stakeholders on the DRP concept and details in order to ensure that the DRP adequately addresses the needs of stakeholders in this planning activity. We also note that the 2009 Draft Recommendation does not specify whether a DRP is state-wide or EEU-specific. This is another area that should be clarified. Accordingly, we direct the Hearing Officer to develop this issue further in the second phase of this proceeding.

(6) Public Information and Education

Findings

113. The EEU should provide general information to the public to (1) increase consumer awareness and understanding of the benefits of reducing energy use, and the best technologies available to them, and (2) refer them to information and resources other than the EEU. Exh. DPS-2 at 11.

114. The EEU should make cost and contact information on commercial and industrial projects publicly available except for competitively sensitive information. Driscoll pf. at 11.

Discussion

AIV asserts that sharing specific information on commercial and industrial projects more broadly could potentially improve the EEU's effectiveness if these projects are replicated.¹⁵⁹ GMP was the only other party to offer testimony on this subject. GMP believes that providing more customer-specific information on projects supported by the EEU would strengthen public confidence.¹⁶⁰ Both AIV and GMP recognize that competitively sensitive information should be protected.¹⁶¹

We are persuaded that it is important for the EEU to make public an appropriate level of detail on customer-specific projects while protecting competitively sensitive information. We

158. Martin pf. at 11.

159. Driscoll pf. at 11.

160. Martin pf. at 13.

161. Driscoll pf. at 11 and Martin pf. at 13.

are uncertain at this time whether additional information regarding this issue should be included in an Order of Appointment. Therefore, we direct the Hearing Officer to conduct further proceedings in the second phase of this Docket to address issues associated with implementing this decision, including what level of detail is appropriate to make publicly available, and whether any more information regarding this issue should be included in an Order of Appointment.

VII. FINANCIAL ISSUES

A. EEU Budget Term

Findings

115. Currently the budget for the EEU is set by the Board after opportunity for comment by the Department and other interested parties. Poor pf. at 4.

116. The determination of demand-side resource goals and associated budgets shall be guided by the objectives and criteria of 30 VSA § 218c, § 209(d), § 209(e), § 202(a), and other applicable sections of Vermont statutes, as well as prior Board Orders. Exh. DPS-2 at 18.

117. Long-term demand-side resource acquisition goals and associated investment budgets for the EEU should be determined in transparent proceedings open to stakeholders before the Board. Bentley pf. at 5.

118. The DRP, as described in findings 107-111, above, would provide short-term (e.g., 3-year) budgets that can serve as the basis of performance indicators to assess an EEU's performance and provide operating assumptions for long-term (e.g., 20-year) budgets that can be used for long-term resource planning by the EEU's, the Department, distribution utilities, and VELCO. Exh. DPS-2 at 16.

119. The requirement that the DRP be revisited on a regular three-year cycle provides an opportunity for the Board, the DPS, and other parties to review and reset short-term EEU operating goals and budgets for the coming three-year period, analogous to the practice under the three-year cycle of the current contract model. At the same time, this process regularly reviews and resets longer-term goal and budget assumptions so that there would always be a relatively

current set of assumptions that can be relied upon for long-term planning purposes. Hamilton pf. at 23-24.

Discussion

The 2009 Draft Recommendation supports the development of three-year EEU budgets and twenty-year EEU budget assumptions that would be updated on a rolling basis every three years as provided in the DRP. No party challenges this recommendation.

Under the current contract model, the Board has set the EEU budgets on a three-year cycle. The three-year budget cycle has worked well for the existing operation of the EEU and, under the Order of Appointment structure, we will continue that current practice. We are persuaded that a twenty-year planning horizon is an important element/aspect of the establishment of EEU goals and budgets. This long-term planning process should be revisited on a three-year cycle to inform the EEU budget cycle. Therefore, we adopt the recommendation for the use of a DRP to develop EEU budgets over the twenty-year planning horizon, updated on a three-year rolling basis.

B. EEU Compensation

Findings

120. An EEU should be afforded the opportunity to recover just and reasonable, prudently incurred, costs and expenses accrued in the provision of services and initiatives under an Appointment, and to earn a fair return. The Board should establish procedures to afford an EEU the opportunity to earn incentive revenues beyond the authorized revenue requirement when performance exceeds predetermined performance metrics. Exh. DPS-2 at 48.

121. The maximum amount payable to an EEU should be the allowable EEU Funds established by the Board for a specific EEU. This maximum amount is inclusive of all eligible costs, expenses and all earned performance incentives. The source of these funds should be the amount of EEC Funds and any other funds under the jurisdiction of the Board that have been allocated for the purposes of the EEU. Exh. DPS-2 at 48.

122. Two types of compensation should be provided to an EEU: (1) Non-Resource Acquisition Compensation; and (2) Resource Acquisition Compensation. Exh. DPS-2 at 48.

123. Resource Acquisition Compensation should be provided to an EEU for services and initiatives that acquire demand-side resources (e.g., MW, MWh, total resource benefit). Exh. DPS-2 at 51.

124. Non-Resource Acquisition Compensation should be provided to an EEU for certain eligible services and initiatives specifically designated in the Order of Appointment, and any subsequent modifications made by the Board. Exh. DPS-2 at 49.

125. The non-resource acquisition compensation mechanism provides an appropriate funding vehicle for required EEU long-term planning activities. The non-resource acquisition compensation could be used to support EEU research and analysis of innovative or alternative program designs or models being used in other states or countries. Fratto pf. at 5 and 8.

126. The EEU should be compensated for non-resource acquisition activities so long as they are determined to be appropriate by the Board and have a limited impact on the EEU budget. The 2009 Draft Recommendation allows the EEU to petition the Board for a mid-year adjustment to these funds should the anticipated scope of the non-resource acquisition activities change. Martin pf. at 5.

127. Of the total budget for the three-year period following establishment of the budget, a percentage specified by the Board should be held back and set aside for performance-based payments that may be earned only by an EEU's attainment of performance indicators. Exh. DPS-2 at 51.

128. The award and amount of performance-based incentives to an EEU should be determined by the Board based upon a reasonably balanced system of risks and rewards that encourages the EEU to operate as efficiently as possible using sound management practices while seeking to maximize the net-benefits to be afforded via the EEU for Vermont electricity consumers. Exh. DPS-2 at 51.

129. The current performance-based evaluation framework is an important and effective aspect of the existing EEU structure. The compensation mechanism has led to the success of the EEU to date and the level of public credibility the EEU has maintained. Steinhurst pf. at 6-7.

130. Under the current EEU contract, billing rates are established at cost with incentive payments for achieving and exceeding established targets. Since profitability is achieved through incentive payments, this obviates the need for penalties for underperformance. Poor pf. at 4; tr. 9/15/09 at 185-188 (Fratto).

131. If the EEU services were to be awarded under a bid process, there may be limited potential interest in a bid that includes a penalty clause with billing rates that are established at cost with incentive payments for achieving and exceeding established targets. Tr. 9/15/09 at 184 (Fratto).

132. It is not uncommon in the energy savings industry for companies that deliver performance contracts to guarantee a certain level of savings. In such a situation, if the promised savings did not materialize after the energy efficiency measures are installed, the performance contractor would write a check to the hiring entity. However, such performance contracts typically involve a multi-building facility, not an entire state. A performance contract arrangement would be somewhat uncommon for a statewide EEU. Tr. 9/15/09 at 187-188 (Fratto).

Discussion

Under 30 V.S.A. § 209(e)(2), the Board shall:

Require that continued or improved efficiencies be made in the production, delivery, and use of energy efficiency services, including the use of compensation mechanisms for any energy efficiency entity appointed under subdivision (d)(2) of this section that are based upon verified savings in energy usage and demand, and other performance targets specified by the board. The linkage between compensation and verified savings in energy usage and demand (and other performance targets) shall be reviewed and adjusted not less than triennially by the board.

The 2009 Draft Recommendation supports that the Board should implement a compensation mechanism that links compensation with performance. No party challenges this recommendation, but parties disagree on how such a mechanism should be structured. The Department contends that the compensation mechanisms in the 2009 Draft Recommendation are

appropriate and do not subject the State to undue risk.¹⁶² CLF credits the success of the EEU with the performance-based compensation.¹⁶³ IBM argues that the compensation mechanism should provide both incentives for overperformance and penalties for underperformance and that the opportunity to earn incentives must be balanced by penalties for failure to achieve objectives.¹⁶⁴ Both IBM and GMP contend the EEU should not be allowed to earn a return based on its revenue or expenses. GMP believes a rate-of-return model is more appropriate for enterprises that must attract capital in competitive markets. IBM states that the EEU service provider should not be shielded from financial risks by being guaranteed a minimum rate of return under all circumstances.¹⁶⁵

The 2009 Draft Recommendation's compensation mechanism is consistent with the current EEU contract. The EEU contractor earns incentive payments for achieving and exceeding established targets. The performance-based compensation is a widely recognized benefit of the current structure and parties agreed that it should be preserved in the Order of Appointment structure. The current compensation mechanism was designed to maximize performance and achieve goals without subjecting the State to undue risk.

We conclude that the Order of Appointment should not include a penalty for underperformance. The current contract compensation rates are established at cost with incentive payments for achieving and exceeding established targets. EEU providers are not likely to offer services at a cost rate if a penalty mechanism is included. Thus, the State may find a limited number of providers being willing to bid for EEU services.

Therefore, we conclude that the current compensation model should continue under the Order of Appointment structure. Given that performance indicators are set every three years, the Board will have an opportunity to review this compensation mechanism at those times.

The 2009 Draft Recommendation supports compensation for non-resource acquisition activities. No parties challenge this recommendation, with the Department and GMP supporting

162. Fratto pf. at 4-5.

163. Steinhurst pf. at 6-7.

164. Aldrich pf. at 15; Aldrich pf. reb. at 35.

165. Aldrich pf. at 15; Martin pf. at 13.

the recommendation.¹⁶⁶ Non-resource acquisition compensation could be used to support long-term planning activities and should have a limited impact on the EEU budget. Therefore, we conclude that non-resource acquisition compensation should be included under the Order of Appointment structure.

C. Performance Indicators

Findings

133. The EEU's performance is currently measured by standards called "performance indicators" which are negotiated by the Board and the EEU as part of the contract process, with significant input from the Department. Performance indicators include goals for MWh, MW (summer and winter), and total resource benefit savings.¹⁶⁷ If the EEU contractor meets or exceeds the goals, then it is provided an incentive award at the end of the three-year contract. Poor pf. at 5.

134. An Order of Appointment would enable greater participation from stakeholders in the process of setting quantifiable performance indicators, and provide opportunity for legitimate concerns about performance or other issues to be heard. The Order of Appointment would provide greater opportunity for input in that it contemplates an open Board process in which stakeholders may propose new ideas from different perspectives. Poor pf. at 11.

135. Performance indicators should measure an EEU's performance over specified time periods. The purpose of the performance indicators should be to establish a reasonably balanced system of risks and rewards that encourages the EEU to operate as efficiently as possible using sound management practices while seeking to maximize the net benefits to be afforded via the EEU for Vermont's electricity consumers and achieving the objectives set forth in 30 V.S.A. § 209(d) and § 209(e). Exh. DPS-2 at 18-19.

166. Fratto pf. at 5 and 8; Martin pf. at 5.

167. Total resource benefits as measured for efficiency services in the EEU contract are defined as the present value of the lifetime net resource savings in electricity, fossil fuel, and water, which are valued projections of avoided resource costs. It does not include measure costs, or any other costs or benefits to customers (e.g., productivity increases, changes in operation and maintenance costs).

136. Performance indicators may include: "Scaled Performance Indicators" (e.g., MWh, MW, TRB, market penetration); "Minimum Requirements" (e.g., portfolio cost-effectiveness, yield, equity indicators); and other indicators (e.g., administrative, operational, or service quality indicators) to afford the EEU the opportunity to earn incentive revenues when performance exceeds predetermined performance metrics. Exh. DPS-2 at 19.

137. The Board should conduct a process no less frequently than every three years to determine which indicators to use for each category of activities (Non-Resource Acquisition and Resource Acquisition services and initiatives), and the values to be set for each indicator. Exh. DPS-2 at 19.

138. The Department should annually certify to the Board whether an EEU has achieved or made appropriate interim progress toward achieving the established performance indicators, whether an EEU is satisfactorily executing its responsibilities that are not directly measured by performance indicators, and whether an EEU's performance relative to its performance indicators is consistent with the portion of the 3-year budget that has been expended. This certification may be provided as part of the annual savings verification process. Exh. DPS-2 at 19-20.

139. In accordance with 30 V.S.A. § 209(e)(12), the Board should require verification by an independent auditor of the reported energy and capacity savings and cost-effectiveness of programs delivered by EEU implementers. This audit should be completed every three years as prescribed by statute. Exh. DPS-2 at 24.

140. Performance indicators directed at customer satisfaction would provide the Board, stakeholders and the EEU important information on the EEU's services and help to raise the bar for its performance. Bentley pf. at 18-19.

Discussion

Under 30 V.S.A. § 209(e)(2), the Board is required to establish performance targets that shall be reviewed and adjusted on a triennial basis. Under 30 V.S.A. § 209(e)(12), the Board shall:

Require verification, on or before January 1, 2003, and every three years thereafter, by an independent auditor of the reported energy and capacity savings

and cost-effectiveness of programs delivered by any entity appointed by the board to deliver energy efficiency programs under subdivision (d)(2) of this section.

All parties agree that performance indicators should be established with performance evaluated in a public participation process on a three-year cycle. The Department, AIV, GMP, and IBM state that performance indicators should also measure administrative efficiency and include cost-effectiveness standards. IBM contends that performance indicators should measure non-resource acquisition tasks.¹⁶⁸ CVPS argues that performance indicators established for the EEU should include measures to assess customer satisfaction.¹⁶⁹ VEIC contends that performance indicators should look at total costs to deliver efficiency resources, rather than segregating incentives from all non-incentive costs.¹⁷⁰

We conclude that performance indicators should measure both resource acquisition and non-resource acquisition activities. Including performance indicators for non-resource acquisition activities should provide appropriate incentives for an EEU to perform well in these areas.

We also conclude that performance indicators should measure administrative efficiency and include cost-effectiveness standards. We recognize VEIC's concern that it may be difficult to segregate administrative costs. The Board will attempt to establish these measures during the process for establishing performance indicators for the EEU. The Initial OPA should provide some benchmarking information to inform the process.

We also conclude that customer satisfaction should be measured for the EEU. We are uncertain at this time whether customer satisfaction should be included as a performance indicator or be treated more like a utility service-quality measure. We will examine these issues during the public process to establish performance indicators that will take place outside of this Docket. Under the Order of Appointment structure, performance indicators will be established in a public process on a three-year cycle.

168. Poor pf. at 11-12; Aldrich pf. at 14; Driscoll pf. at 9; Martin pf. at 12; Aldrich pf. reb. at 33.

169. Bentley pf. at 18-19.

170. Plunkett pf. reb. at 33.

D. Other Funding Mechanisms

Findings

141. The EEU is funded through a separately stated Energy Efficiency Charge ("EEC") on electric ratepayers' bills. Poor pf. at 4.

142. The EEC is a separately, non-bypassable, volumetric system benefits charge on the bill from all Vermont distribution utilities to their customers. Exh. DPS-2 at 12.

143. The EEC is established by the Board annually in accordance with the requirements of Board Rule 5.300. Exh. DPS-2 at 12.

144. An EEU should, to the best of its ability, facilitate the development of, and/or develop, additional funding mechanisms that leverage non-EEU funds (such as grant and Federal funds) that will increase the acquisition of cost-effective demand-side resources. Exh. DPS-2 at 45.

145. Seeking funds from third-party sources has been required by the contract between the Board and VEIC. Hamilton pf. at 39.

146. Since 2000, VEIC has pursued third-party funding to increase the amount of efficiency investment it can stimulate. Plunkett reb. at 38.

147. The Board should encourage an EEU to seek additional funding mechanisms. Poor pf. at 22.

148. Under an Order of Appointment structure, expenses incurred by an EEU for efforts to seek alternative funding should be funded through a non-resource acquisition compensation methodology. Poor pf. at 22.

149. Any Board process to determine the appropriate disposition of alternative funds should be commensurate with the amount of funds at issue, and should take into account the administrative burden of conducting such a process. Poor pf. at 22.

150. The new EEU structure should be designed to maximize the ability of the EEU to access capital through long-term bonding or other financing tools. This was a key limitation in the EEU budget determination and must be addressed if Vermont is to acquire all reasonably available cost-effective energy efficiency resources. Steinhurst pf. at 7.

151. Using any additional funds to acquire additional cost-effective energy efficiency would have two benefits. It would acquire additional low-cost resources when compared to supply

options. It would also create an incentive for the EEU to seek additional funds. Steinhurst pf. reb. at 11.

Discussion

Under 30 V.S.A. § 209(e)(6), the Board shall:

Consider innovative approaches to delivering energy efficiency, including strategies to encourage third party financing and customer contributions to the cost of efficiency measures.

All parties agree that the EEU should seek independent funding mechanisms that leverage non-EEU funds, but they disagree on whether additional funds should reduce EEC collections. Both AIV and IBM believe that additional funds should be used to reduce the burden of the EEU on the ratepayers of Vermont. IBM states further that the EEU can function as a catalyst for project financing, but should not itself be a lender.¹⁷¹

In order to reduce the administrative burden on all parties, the Department suggests that additional one-time or annual funding in an agreed-upon percentage of an EEU's annual budget acquired by an EEU should be used in addition to the EEC, with appropriate adjustments made to performance goals to reflect additional funding. According to the Department, for additional funding acquired by an EEU in excess of 10 percent of an EEU's annual budget, it should be determined by the Board on a case-by-case basis whether additional funding should be in addition to, or an offset to, the funding from the EEC.¹⁷²

VEIC does not support any change to the EEC rates established by the Board as a function of funds being available from other sources, as suggested by some parties. VEIC argues that such a requirement would eliminate any incentive for an EEU to seek such funds, even though they could provide additional benefits to ratepayers.¹⁷³ CLF agrees that a structure that encourages the EEU to acquire non-EEC funding resources will encourage acquisition of additional cost-effective savings.¹⁷⁴

171. Aldrich pf. reb. at 36; Aldrich pf. at 34-36; Driscoll pf. at 10.

172. Poor pf. at 22.

173. Hamilton pf. at 39.

174. Steinhurst pf. reb. at 11.

Since its inception, EEUs have been encouraged to seek alternative funding sources to increase the amount of efficiency investment they can stimulate. No parties object to the concept that an EEU should continue to seek funds in addition to the Board-authorized budgets. The Department recommends that the EEUs continue to be encouraged in such efforts, and be compensated through the non-resource acquisition compensation sources to ensure such efforts take place.

There are two issues of concern with regard to an EEU obtaining additional funding: (1) whether the EEC collection be adjusted to reflect the additional funding; and (2) whether an EEU's goals and performance indicators should be adjusted.¹⁷⁵ We are addressing these issues independently.

With regard to the EEC collection, under the existing EEU structure, an EEU is allowed to obtain small amounts of additional funding without changes to the EEC collection. Reducing the EEC collected to reflect any amount of additional funding obtained would discourage an EEU from obtaining any additional funding. However, above a certain percentage threshold of an EEU's annual budget, we conclude that additional funding acquired by an EEU should be reviewed by the Board, on a case-by-case basis, as to whether the EEC collection should be adjusted. We are uncertain at this time as to what percent of an EEU's annual budget should trigger this review. Therefore, we direct the Hearing Officer to conduct further proceedings regarding this issue in the second phase of this docket so that an appropriate percentage threshold can be incorporated in an Order of Appointment.

With regard to an EEU's goals and performance indicators, additional funding may require Board review. Where the amount of additional funding is a small percentage of the EEU budget, we conclude that no changes should be made to the EEU goals or performance indicators. In this case, it is not in the ratepayers' interests to have an expensive protracted process for deciding whether any changes are appropriate. However, if an EEU were to acquire a significant amount of funding in addition to its current budget, at some yet unidentifiable

175. We note that EEU budgets are also funded through the FCM participation and RGGI auctions for the purpose of heating and process-fuel efficiency measures. Unlike the EEC collection, this portion of the budget cannot be adjusted, but program goals and performance indicators can be adjusted to reflect additional funding.

percentage threshold, the Board should consider scaling performance indicators, developing new indicators, or making programmatic changes. However, these percent changes and thresholds cannot be identified at this time. Therefore, we direct the Hearing Officer to conduct further proceedings regarding this issue in the second phase of this docket so that an appropriate threshold can be incorporated in an Order of Appointment.

An Order of Appointment structure will require an EEU to inform the Board whenever it receives any additional funds. This information will be used to inform the Board if a threshold level has been triggered requiring the review of the EEC collection or review of goals and performance indicators. This information will also inform the Board during the process for setting future year budgets.

VIII. ROLES OF OTHER ENTITIES

The EEU involves several entities that collectively provide not only the delivery of efficiency services, but also the evaluation, financial accounting, and oversight necessary to ensure proper functioning of the EEU. In restructuring the EEU from a contract model to an Order of Appointment model, the role of certain entities involved in the current structure must be modified. Below, we discuss the roles of these entities under the new Order of Appointment model.

A. Efficiency Providers

There are three entities that currently provide efficiency services to Vermont ratepayers: Efficiency Vermont, BED, and Vermont Gas. This Order extensively discusses the restructuring of Efficiency Vermont, and we do not reiterate that discussion here. The roles of BED and Vermont Gas under the Order of Appointment model are discussed briefly below.

(1) City of Burlington Electric Department

During the creation of the EEU, the Board authorized BED to continue to implement efficiency services within its service territory, subject to Board approval, as long as the benefits

of BED providing such services outweigh the risks or potential inefficiencies of such delivery.¹⁷⁶ BED and VEIC currently coordinate on the provision of efficiency services,¹⁷⁷ and the proposed Order of Appointment model would require that such coordination continue.¹⁷⁸

The proceedings in this Docket focuses primarily on the activities of Efficiency Vermont; however, the Department proposed that BED also be subject to an Initial OPA prior to appointing BED.¹⁷⁹ Also, in its Initial Brief, BED stated that it "foresees a separate and follow-on proceeding to the appointment process for VEIC which would be specific to BED, should the Board agree to move to an Order of Appointment."¹⁸⁰ No other party commented on this issue.

As discussed in Section VD, above, we find it appropriate to conduct an Initial OPA that will focus on whether EEU services should continue to be delivered separately in BED's service territory.

(2) Vermont Gas

Vermont Gas currently provides energy efficiency services to its natural gas customers. This Docket did not address the role of Vermont Gas with respect to the EEUs. Currently, Efficiency Vermont and BED coordinate with Vermont Gas when they provide electric efficiency services to Vermont Gas customers. We will require this coordination to continue under the new structure.

However, we note that when the EEU Structure Working Group process began in 2007, the EEU delivered limited fossil-fuel efficiency services. Consequently, that workshop process, and this Docket that resulted from those workshops, focused primarily on the electric efficiency services provided by the EEU. Since that time, the Vermont Legislature has expanded the scope of the EEU's services to include heating and process-fuel efficiency, funded through mechanisms other than the EEC. Accordingly, it is appropriate to consider whether there should be any changes to Vermont Gas' relationship with the EEU as a result of the EEU's new responsibilities

176. Docket 5980, Order of 9/30/99 at 26, Order of 9/22/00 at 14.

177. Tr. 9/16/09 at 145 (Buckley).

178. Exh. DPS-2 at 43.

179. Poor pf. at 19-20.

180. BED Initial Brief at 5.

for heating and process-fuel efficiency. The Board will consider this issue in a separate process outside this Docket. Such consideration should be completed prior to the issuance of an initial Order of Appointment for an EEU.

(3) Other EEUs

Pursuant to Section 209(d)(2) the Board may appoint "one or more entities" to deliver efficiency services. In addition, the Draft Recommendations filed in the Docket all explicitly state that the Board may appoint multiple EEUs. At this time, we are not exploring the possibility of appointing an additional EEU. However, the results of the Initial OPA could suggest that certain services currently provided by Efficiency Vermont could more effectively be provided by another entity.¹⁸¹ We will address this issue, if appropriate, after we have received the results of the Initial OPA. In addition, on a going forward basis, it is possible that, if a particular energy efficiency service or program is not offered by an incumbent EEU, or if a ratepayer segment is not being served appropriately by an EEU, other entities could petition the Board for an appointment to provide such services as an EEU.¹⁸² The Board will address any such proposals if and when they arise. While we recognize that there are certain advantages to having one entity providing coordinated services, there may well be circumstances under which Vermont ratepayers would be better served by having an entity other than Efficiency Vermont provide such services.

B. Additional Components of the EEU

In addition to the energy efficiency providers, there are several entities that provide a necessary and supporting role in the current contract structure to ensure that Vermonters receive the maximum value from the EEU. These entities include: the Department, which implements the evaluation programs to ensure overall effectiveness of the EEU; the Contract Administrator, which assists the Board with managing and implementing the contract with VEIC; the Fiscal

181. Tr. 9/15/09 at 86 (Poor).

182. Poor pf. reb. at 2.

Agent, which provides the accounting function of managing the EEU Fund; and the EEU Advisory Committee, consisting of interested stakeholders, which provides advice to the EEU.

(1) Contract Administrator

Under the current contract model, the EEU Contract Administrator serves under contract to the Board and performs a variety of functions, including, tracking compliance of Efficiency Vermont with the terms of the contract, reviewing invoices to be paid by the Fiscal Agent, and mediating any disputes that arise related to the EEU.

Findings

152. Under the Order of Appointment model, many valuable functions currently carried out by the current EEU Contract Administrator will still need to be performed. Plunkett pf. reb. at 10.

153. The mediation role currently assigned to the Contract Administrator is unnecessary because any irresolvable disputes should come before the Board. Poor pf. at 21.

Discussion

VEIC proposes that the Board retain the essential functions of the current Contract Administrator by hiring an EEU Facilitator. VEIC further proposes that, if the Board does not retain an independent EEU Facilitator, "the next best approach would be to transfer these responsibilities to the EEU."¹⁸³ The Department proposes that the Board hold additional proceedings to examine what responsibilities of the Contract Administrator would still be necessary under the appointment model.¹⁸⁴

We disagree, by altering the structure of the EEU we are negating the need for a Contract Administrator. Although several functions of the Contract Administrator must be continued, no party has provided sufficient demonstration that a single EEU Facilitator is required to perform these functions. Instead, it appears that the functions of the Contract Administrator can be

183. VEIC Initial Brief at 13.

184. Poor pf. at 21-22.

divided among the relevant entities: the EEU; the Department; and the Board. We direct the Hearing Officer to conduct further proceedings to determine precisely which functions must continue and which entity should be responsible for these functions. This determination must be complete before the first Order of Appointment is issued.

One function of the Contract Administrator that has been discussed at length during these proceedings is mediation of disputes related to the EEU. VEIC states that "[t]here appears to be no reason to eliminate the possibility of mediation in the event of a difference of opinion between the EEU and the Department."¹⁸⁵ However, this position is inconsistent with the concept that the EEU structure should be more analogous to the structure of an electric utility. The Board does not employ a mediator for disputes between the Department, or consumers, and any other utility; instead disputes are brought to the Board for resolution. Parties are, of course, free to hire a mediator if they so choose. No party has provided sufficient rationale for why such a service is required for the EEU, and during the additional proceedings to determine the appropriate location for the Contract Administrator's responsibilities, the role of mediator shall not be included in the potential functions to be assigned to other entities.

Finally, we note that the position of Contract Administrator is currently funded through the EEU Fund. It is expected that any entity which takes on any of the responsibilities of the Contract Administrator will have the option of seeking funding of these responsibilities through the EEU Fund. The Board will further evaluate the funding issue when determining the appropriate disposition of the Contract Administrator's duties.

(2) EEU Advisory Committee

Under the current EEU model, the EEU Advisory Committee is designed to be "a channel of communication between important stakeholders and the EEU."¹⁸⁶ The members of the committee are appointed by the Board and consist of representatives from the electric distribution utilities, consumers, the Department, and any other groups determined to be necessary by the

185. VEIC Initial Brief at 12.

186. Docket 5980, Order of 9/30/99 at 33.

Board.¹⁸⁷ In addition to the EEU Advisory Committee, the 5980 MOU "allows the EEU to appoint other advisory committees to serve its program management needs, but this is a prerogative, not an obligation, of the EEU."¹⁸⁸

Findings

154. The EEU Advisory Committee is unnecessary under an Order of Appointment model. The transparency and public input functions that the Advisory Committee is designed to ensure would be addressed through the public process setting the budget and performance indicators for an EEU. Poor pf. at 21; Aldrich pf. reb. at 29.

Discussion

GMP and AIV are the only parties that recommend the Board maintain the EEU Advisory Committee under an Order of Appointment model, with the members of the Committee being appointed by the Board. GMP and AIV recommend that an EEU Advisory Committee be independent from the EEU in order to provide autonomous advice and assessments of the EEU.¹⁸⁹ The Department and IBM maintain that there is no longer a need for the EEU Advisory Committee, but if the Board decides to retain an Advisory Committee, the members should be appointed by the Board to maintain the independence of the group.¹⁹⁰ Finally, VEIC states that there is no need for a Board-appointed Advisory Committee, but the EEU could decide to create an Advisory Committee, and, if so, the EEU should appoint the members of that committee.¹⁹¹

We conclude that the EEU Advisory Committee is no longer required under the Order of Appointment model. Under the new structure, significant decisions, such as establishing the EEU budget, setting performance indicators, and reviewing the Annual Plan, will be made in the context of open proceedings. The public input provided in these proceedings should provide a level of engagement and advice similar to that provided by the EEU Advisory Committee. We

187. *Id.*

188. *Id.*, at footnote 68.

189. Martin pf. at 10; Driscoll pf. at 10.

190. Poor pf. at 21; Aldrich pf. reb. at 29.

191. Hamilton pf. at 38-39.

encourage current members of the EEU Advisory Committee to participate in these proceedings and provide comments. Such participation adds value to the Board's proceedings and results in a better outcome; however, no party has provided sufficient rationale for why participation in these processes would be better accomplished through an Advisory Committee rather than participation by individual parties.

(3) Department of Public Service

Under the current model, the Department provides for monitoring and evaluating the EEU's performance;¹⁹² however, the Board retains the statutorily mandated responsibility to ensure that these tasks are completed.¹⁹³ These evaluation responsibilities include annual savings verification for savings claimed by Efficiency Vermont and BED, as well as program evaluation for both entities. Under the Order of Appointment model, the Department will continue to be the lead entity for evaluating the EEU's performance, but the Board may take steps to ensure that these functions are performed in a timely manner. The effective functioning of the EEU under the new Order of Appointment model is dependent upon timely review and evaluation of the EEU. While we conclude that it is appropriate for the Department to provide the necessary evaluation activities, we note that, in the past, the Department has not always been able to provide the necessary evaluations in a timely manner due to limited resources. If the Department has difficulty in meeting the requirements of the new EEU structure, it should petition the Board for additional resources or other assistance.

(4) Fiscal Agent

Findings

155. The Fiscal Agent should receive all EEC revenues paid to and/or collected by distribution utilities and should disburse them to an EEU and such other persons or organizations, all as directed by the Board. The Fiscal Agent should keep accurate accounts of

192. Docket 5980, Order of 9/30/99 at 33.

193. 30 V.S.A. § 209(e).

all money it receives and disburses. The Fiscal Agent should be an agent of the Board and should be independent of any EEU. Exh. DPS-2 at 12.

Discussion

This Order does not alter the EEU Fund or the method of providing monies to the EEU Fund. We do not anticipate any changes to the role of the Fiscal Agent, other than determining which entity will authorize the Fiscal Agent to make disbursements from the EEU Fund, given the dissolution of the Contract Administrator position.

IX. CONCLUSION

For the reasons described above, we find that the proposed Order of Appointment model will benefit ratepayers by providing increased programmatic stability and a more open process for ensuring superior performance of the EEU. The increased complexity of the EEU program, compared to its origin ten years ago, along with the knowledge gained by years of implementing and continuously improving the EEU lead us to conclude that moving to a twelve-year rolling appointment model from the existing three-year contract model will allow for better delivery of efficiency programs, and greater savings, to Vermonters. The transition to the Order of Appointment model will take time and will require additional effort on the part of interested parties. Accordingly, the Board is appointing a Hearing Officer to conduct additional proceedings to address the implementation details discussed in this Order.

X. NOTICE OF STATUS CONFERENCE

Pursuant to 30 V.S.A. § 8, we are appointing Ann Bishop, Chief Economist, as Hearing Officer to conduct the proceedings in phase two of this Docket. Pursuant to 30 V.S.A. §§ 8, 10, 209(d) and (e), the Hearing Officer will hold a status conference commencing at 1:30 p.m. on Friday, December 18, 2009, at the Public Service Board Hearing Room, Third Floor, Chittenden Bank Building, 112 State Street, Montpelier, Vermont. Parties should be prepared to discuss a process and schedule for phase two of this proceeding.

XI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The structure of Vermont's Energy Efficiency Utility ("EEU") shall be changed from a contract model to an Order of Appointment model.
2. The Order of Appointment model shall provide for an initial rolling 12-year term, and subsequent "renewal" terms of approximately 11 years.
3. An Initial Overall Performance Assessment, as described above, shall be performed for both the statewide EEU and the City of Burlington Electric Department's service territory prior to the issuance of any Orders of Appointment.
4. Upon appointment, an EEU shall not be able to abandon or curtail any responsibilities associated with the appointment without first obtaining the approval of the Public Service Board ("Board").
5. The Board shall be able to terminate an EEU's appointment at any time prior to its end date for good cause, following a Board decision that ratepayers would benefit by issuing a solicitation for entities to perform services as an EEU, or if the Board chooses to no longer use an EEU to perform the functions identified in 30 V.S.A. § 209(d).
6. If an EEU's appointment is terminated, the EEU shall remain responsible for all payments due up to the time of termination and all liabilities arising from any disputes arising from such contracts up to the time of termination. Any outstanding commitments made as part of its responsibilities as an EEU from the date of termination forward shall become the responsibility of the successor EEU. If there is no successor EEU, the Board will determine who shall be responsible for these obligations at that time.
7. An EEU's performance shall be reviewed according to the schedule shown in Attachment A and discussed herein, except that any interested person may ask the Board to perform an Overall Performance Assessment at any time, for good cause. Any such request shall state the reason for the request. The Board will review any such requests, including the supporting information provided with the requests, and determine whether sufficient cause exists to warrant initiating an OPA.

8. A Benchmarking Review of an EEU, as described herein, shall be performed every three years, in time to inform the process used to set performance goals. The Vermont Department of Public Service ("DPS") may perform the Benchmarking Reviews; if it elects not to do so, the Board will perform them.

9. The Long-Term Demand Resources Plan ("DRP") shall be used to develop three-year EEU budgets and provide operating assumptions for long-term (20-year) budgets. EEU budgets shall be updated on a rolling three-year basis.

10. The maximum amount payable to an EEU shall be the allowable EEU Funds established by the Board for a specific EEU. This maximum amount shall be inclusive of all eligible costs, expenses and all earned performance incentives. The sources of these funds shall be the amount of Energy Efficiency Charge ("EEC") funds and any other funds under the jurisdiction of the Board that have been allocated for the purposes of the EEU.

11. Two types of compensation shall be provided to an EEU: (1) Non-Resource Acquisition Compensation; and (2) Resource Acquisition Compensation.

12. Of the maximum amount payable to an EEU, a percentage, specified by the Board, shall be held back and set aside for performance-based payments that may be earned only by an EEU's attainment of performance indicators.

13. A public process shall be conducted no less frequently than every three years to determine which performance indicators to use for each category of an EEU's activities, and the values to be set for each performance indicator.

14. If it so elects, the DPS shall annually certify to the Board whether an EEU has achieved or made appropriate interim progress toward achieving the established performance indicators, whether an EEU is satisfactorily executing its responsibilities that are not directly measured by performance indicators, and whether an EEU's performance relative to its performance indicators is consistent with the portion of the three-year budget that has been expended. This certification may be provided as part of the annual savings verification process. If the DPS elects not to provide such certification, the Board will arrange to have such certification performed.

15. All EEUs shall continue to coordinate with Vermont Gas Systems, Inc. ("Vermont Gas") when delivering electric energy efficiency services to Vermont Gas customers.

16. The EEU Contract Administrator will no longer be required under the Order of Appointment model, and that position shall cease to exist at the time the initial Order of Appointment takes effect.

17. The EEU Advisory Committee will no longer be required under the Order of Appointment model, and shall cease to exist at the time the initial Order of Appointment takes effect.

18. The DPS shall continue to be the lead entity for evaluating the EEU's performance, if it so elects, but the Board may take steps to ensure that these functions are performed in a timely manner. If the DPS elects not to perform such evaluation, the Board shall do so.

19. The responsibilities of the Fiscal Agent for the EEU Fund shall remain largely the same, except that given the dissolution of the Contract Administrator position, another entity shall authorize the Fiscal Agent to make disbursements from the EEU Fund.

20. Pursuant to 30 V.S.A. § 8, Ann Bishop, Chief Economist, is appointed to serve as Hearing Officer for additional proceedings in phase two of this docket. These additional proceedings shall address the following topics:

- the development of a proposed Order of Appointment;
- issues associated with the possible start date of an initial Order of Appointment;
- if an EEU's appointment is revoked because the EEU has materially breached the terms of its appointment or because of bankruptcy, whether a period of advance notice should be required, and if so, what that period of time should be;
- an EEU's role with respect to geographically targeted programs;
- the guidelines attached to the 2009 Draft Recommendation regarding the EEU's role in combined-heat-and-power projects, including consideration of the appropriateness of the risk adjustment contained therein;
- the concept and details of the DRP, including clarification regarding whether one statewide DRP will be prepared, or whether each appointed EEU (if there are more than one) will prepare a separate DRP;
- issues associated with making an appropriate level of customer-specific information concerning projects publicly available while protecting competitively sensitive information, including what level of detail is appropriate to make publicly available, and what information regarding this issue should be included in an Order of Appointment;

- the threshold amount of additional funding acquired by an EEU that would require the Board to examine, on a case-by-case basis, whether Energy Efficiency Charge collections should be adjusted to reflect the additional funding;
- the threshold amount of additional funding acquired by an EEU that would require the Board to examine, on a case-by-case basis, whether an EEU's goals should be adjusted, new performance indicators developed, or programmatic changes made; and
- which functions currently performed by the Contract Administrator should continue, and which entities should be assigned those functions (the role of mediator shall not be included in the potential functions to be assigned to other entities).

21. Phase two of this proceeding shall not revisit issues decided in this Order unless this Order specifically authorizes such further consideration.

22. Pursuant to 30 V.S.A. §§ 8, 10, and 209(d) and (e), the Hearing Officer shall hold a status conference at 1:30 p.m. on Friday, December 18, 2009, at the Public Service Board Hearing Room, Third Floor, Chittenden Bank Building, 112 State Street, Montpelier. Parties should be prepared to discuss at the status conference a process and schedule for phase two of this proceeding.

23. The terms and conditions contained in the proposed initial Order of Appointment shall be consistent with this Order. The proposed initial Order of Appointment shall incorporate the aspects of the three Draft Recommendations that have not been challenged by any party during this phase of the docket.

24. All findings and conclusions requested by the parties and not specifically adopted above are, hereby, rejected.

Dated at Montpelier, Vermont, this 24th day of November, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 24, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.